THE

PRACTICE OF THE LAW

IN

ALL ITS DEPARTMENTS;

WITH A VIEW OF

RIGHTS, INJURIES, AND REMEDIES,

AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHOWING

THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;

AND

THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES, AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES; OR TO ENFORCE SPECIFIC RELIEF, OR PERFORMANCE, OR COMPENSATION.

AND SHOWING

THE PRACTICE

IN ARBITRATIONS, BEFORE JUSTICES, IN COURTS OF COMMON LAW, EQUITY, ECCLESIASTICAL AND SPIRITUAL, ADMIRALTY, AND COURTS OF APPEAL.

WITH NEW PRACTICAL FORMS.

INTENDED AS

A COURT AND CIRCUIT COMPANION.

IN TWO VOLUMES.

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TO

THE SECOND PART.

The plan and outline of this Work, and of the first *Four* Chapters in particular, have already been sufficiently explained in the Preface. This Part proceeds with the Six following still more important Chapters. In the *Fifth* Chapter are considered the various *precautionary measures* to anticipate and prevent *expected* injuries *before* their inception, and in almost every situation of difficulty that usually gives rise to litigation.

The *Sixth* Chapter states those *preliminary steps* that may be advisable *after the inception* of an injury, but before the commencement of hostile measures or of litigation respecting them.

In the *Seventh* Chapter the numerous remedies by acts of *parties* themselves, or their relations, friends, or third persons, without any assistance of the officers of the law, or of legal process, and either to *prevent, resist, defend,* remove, or abate injuries, or to obtain satisfaction by their own act, as allowed by law, are fully considered; stating all the instances in which the *defence* of the Person, Personal Property, or Real Property is allowed, and the means to be adopted; and when a relation, servant, friend, or stranger may interfere, and how; when and how private individuals may, without warrant or process, *apprehend offenders;* when

and by what means *resistance of process*, escapes, rescues, prison-breaking, and pound-breach, are lawful or criminal, or at least imprudent; when *recaption* of the person, personal or real property, is allowed, and how; the *abatement and removal* of private and public nuisances, and other injuries. The law of Distresses and Seizures for Rent, or upon cattle Damage feasant, or for Poor Rates, Tolls, &c.; andthe law of set-off, and Remedies by Retainer and Lien, are also examined.

In Chapter *Eight* are stated the several *preventions and removals of injuries by Legal Authority;* as those by Justices of the Peace, Peace Officers, or by Judges, by obtaining *security to keep the peace* or to be of good behaviour, whether by application to a single Justice or at Sessions, or by exhibiting articles of the Peace in the Court of King's Bench, or by articles and supplicavit to the Chancellor, with the practice on obtaining each of these protections; the removal of Imprisonment by writ of *Habeas Corpus*, with the law and practice respecting the same; the more formal proceedings at Law or in Equity to prevent or remove injuries, and especially the law and practice respecting *Injunctions*, a branch of equitable jurisdiction of the very greatest importance to be well known, as well to practitioners at Law as to those in Equity; the prevention of the loss of an equitable debt or claim by the writ *ne exeat regno*, or of loss of evidence by bills to *perpetuate testimony*, and bills and injunctions to restrain unjust actions or proceedings at law or in other courts; bills of *Interpleader*, and other proceedings. Some preventive remedies in local courts are also noticed.

In the *Ninth* Chapter it is supposed that an injury

has been completed, and that some time having since elapsed, it becomes necessary to ascertain whether any *Statute of Limitations*, or any *presumption from delay*, constitutes any bar to the proper remedy for relief or compensation. Here are considered all the statutes of limitations, and other consequences of delay or laches, in commencing the remedy as well at law as in equity, and in bankruptcy, in cases of executors or administrators, in Ecclesiastical and Spiritual Courts, in Admiralty Courts, and in Criminal Courts; together with the *prejudice* incident to *laches* at common law, and in Courts of Equity, independently of any express limitation by statute.

In the *Tenth* chapter are very fully considered all the remedies at law, and in equity, or elsewhere, to compel *specific relief* or *performance*, whether as respects the rights of *Persons*, *Personal* or *Real* Property, and as it will obviously be frequently preferable to enforce the actual and full *enjoyment* of a right *specifically* than the mere recovery of damages in compensation for the injury, all these *specific remedies* are very fully and practically considered, especially as regards the extensive jurisdiction of the Court of King's Bench by *Mandamus*, and the still more important analogous jurisdiction in Equity, by *Bills for, and Decrees compelling the Specific Performance of Contracts* and *other rights*, Bills to *Account*, and other specific remedies; and Bills in Equity to *prevent* the specific enforcement at law of *Penalties* and *Forfeitures*, or legal rights.

The full particulars of the subjects of this part may be ascertained by examining the table of contents and the Analytical Table of each chapter, and every single point or question will be found referred to in

the Index. As *specimens* of the probable utility of the undertaking, and the mode of executing it, the author begs to refer to the arrangement of the important branch of the law relating to *Executors and Administrators,* in pages 510 to 561—to the *Defence, Resistance, and Removal* of Injuries by parties themselves, in pages 586 to 669, and upon which so many questions arise, as well in actions of trespass as in the Criminal Courts—to the law and practice relating to the writ of *Habeas Corpus,* in pages 684 to 695—to *writs of Injunction,* in pages 695 to 731, to the whole chapter on the *Statutes of Limitations,* 736 to 786—to the law and practice upon writs of *Mandamus,* in pages 789 to 810, and to pages 820 to 871, as respects bills for and decrees of *Specific Performance.* The modes of treating those important subjects the author believes are new, and he hopes they may be found in some degree worthy of attention.

The rest of the work, which states the *minutiæ of the Practice* of all the principal Courts of *Law* and *Equity,* and of the *Ecclesiastical* and *Spiritual* Courts, and Courts of *Admiralty,* &c. &c., and in *Arbitrations,* and in conducting *Summary proceedings before Justices* of the Peace, is in a great state of forwardness, and is withheld for the present merely in order that all the alterations in the law during the present sessions may be incorporated. In treating of *the Practice of the Courts of King's Bench, Common Pleas, and Exchequer,* the author has pursued the object of the Legislature and of the Judges by endeavouring to *assimilate* the practice of all the Courts; instead, therefore, of writing distinct chapters or parts on the *separate* and *distinct* practice of each Court, and which the author submits would

occasion unnecessary *repetition*) he has attempted to revive the excellent and lucid plans adopted in Crompton and Sellon's Practice, viz. of stating in one *principal column* the full practice of the Court of *King's Bench*, and then in the same page, in adjoining columns, showing the difference, if any, in the practice of the Courts of *Common Pleas* and *Exchequer*, and in notes *subscribing* the clauses of statutes, and rules and principal forms of the writs and proceedings, showing when any occasional deviation may be advisable. By this plan the Student and Practitioner may *at one view*, and without referring to numerous books repeating the same rules which equally apply to all the Courts, perceive the whole practice of all the courts of similar jurisdiction.

The same plan has been observed as regards the practice of the *Courts of Equity*, and whether the proceeding be before the Chancellor or the Vice-Chancellor, or the Master of the Rolls, or on the equity side of the Court of Exchequer.

As a *distinct* publication not necessarily incumbering the subscribers to the principal work, a volume of *Forms* or *Precedents* will be published with subscribed notes of practical directions how to apply them. . This will contain *forms* of every description of *Conveyance and Contract*, whether relating to absolute or relative rights, settled by the most eminent conveyancers and adapted to the law as altered in this and the preceding sessions, also the forms of every *Writ* and *Practical proceeding* at *Law* and in *Equity*, and in the Ecclesiastical and Admiralty Courts, and Courts of Error and Appeal.

The author begs to acknowledge the obligations

conferred upon him by several gentlemen, officers of the courts and others, for the ready assistance and valuable information they have afforded him; and he will consider himself still further indebted to any practioner who will take the trouble of forwarding to him any further information or suggestions early in this vacation.

The author did not venture, until very flattering opinions of the *first* part of this work had been generally expressed, to implicate *his son Henry* in what might turn out a failure; but he cannot now refrain from acknowledging that, in the Fourth Chapter of the first part, relative to *Real Property* and *Conveyancing*, he derived from him much *valuable practical information*, which he could not otherwise have introduced, and which enables him with confidence to recommend that chapter in particular to the attention of Students and the Profession in general.

J. C.

Chambers, 6, Chancery Lane,
20th June, 1833.

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I. RETAINER OF AN ATTORNEY, SOLICITOR, PROCTOR, OR AGENT.

PERHAPS of all precautionary measures that of obtaining the advice and assistance of a professional person before adopting any step, is the most important, since very few individuals, who have not practised as well as studied the law, can anticipate on every occasion all the difficulties that may arise, or what may be the most judicious line of conduct to be pursued. This and the three following chapters are intended principally to *assist* individuals in their choice of the best precautionary measures, and of the best remedies; but still it will be essential in general to have a professional adviser; with respect to the choice of whom and his functions and duties, a distinct chapter will hereafter be given. It may suffice here to observe that it is essentially important to select not a mere lawyer but a gentleman of known high character, as well for his knowledge of all his professional duties, but also of adequate knowledge of the world, and a good negociator, and disposed to avoid litigation, and

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above all, one who has not nor is likely to have any connection with the expected opponent which might hereafter render the confidence reposed in him injurious to the interests of his employer, and it might be well in some cases to require an explicit engagement to that effect. (*a*) It will be prudent on the part of the professional adviser to put to his client, in the first instance, and even in writing, all questions in the slightest degree connected with his case, so as to anticipate every point that might thereafter arise in the course of the expected litigation; and the client should deliberately, when time will allow, answer the same in writing. This and a subsequent conference would probably secure an accurate and useful investigation and explanation, which would govern every subsequent step and prevent the errors and defects too frequently to be attributed to the want of due inquiry and consideration in the first instance. (*b*)

(*a*) See the observations of Sir E. Sugden in his excellent work on Vendors and Purchasers, 8th ed. Introd. And see the cases, *Beer* v. *Ward*, 1 Jacob's R. 77; *Bricheno* v. *Thorp*, Id. 300; *Cholmondeley* v. *Clinton*, 19 Ves. 261; Coop. 80, S. C. 1 Madd. Ch. Pr. 160; which evince the hazard of employing a solicitor, who, or whose clerks, may afterwards be retained by the opponent; and see the *general principle* as to injunctions to prevent the disclosure of confidential communications, *Fritt* v. *Price*, 1 Simon's R. 485; *Yovath* v. *Winyard*, 1 Jac. & Walk. 394; *post*, chap. viii. Lord Tenterden frequently stated the impolicy and danger of parting with, or showing title deeds or other documents; and mentioned instances of parties having *lost their estates* by placing unlimited confidence in their solicitors, who, though honourable themselves, suffered documents to be read by clerks or others in their offices, which were afterwards communicated to an adverse claimant. See further, the Newcastle case, 8 Ves. 141, and Sugd. V. & P. 306, where a large property was lost by this want of caution.

Questions to be stated and answered in writing.

(*b*) It may not be devoid of utility to suggest a few of the questions which, in the natural course of litigation, may arise. Such only need be considered as bear on each particular case.

1st. What was the *right* affected? Was it private or public? or was it both? If private, was it temporal or ecclesiastical, legal or equitable, vested in the party complaining or in his trustee? Absolute or relative; in possession, remainder, or reversion? Depending on any and what contract, or without contract?

2d. Was the *injury* private or public, civil or criminal, temporal or ecclesiastical, a tort or a breach of contract? And if the former, was it with or without force, immediate or consequential, a nonfeazance, misfeazance, or malfeazance?

3d. What are the several *remedies*, whether by any and what prevention or removal of the expected injury by the party himself, or the interference of an inferior or superior tribunal, or for enforcing specific performance or compensation by some legal proceeding?

4th. What if any *precaution* should be taken to *prevent* the possibility of even remote injury from or litigation with any unknown party?

5th. Supposing an injury is threatened or expected from a particular individual, then is it necessary to take any and what preliminary step, as to make a demand, &c. before the commencement of any hostile measures?

6th. Can the injury be legally *prevented* or *removed* by any and what proceedings of the party complaining, or by any and what relation or agent, and without the interference of any constituted authority?

7th. Can the injury be *prevented* by application to any and what constituted authority, and by what proceeding?

8th. Supposing that the injury has been *completed* by *some* person, has it been barred by any and what statute of limitations, or any presumption of payment, &c.? and is there any mode of preventing such bar; and if not, then is there any *criminal* remedy for the same injury?

9th. Is there any and what mode of ascertaining who in particular was the wrong-

II. General observations relating to the necessity for, or expediency of certain precautionary measures.

II. "*Measures and laws to anticipate and prevent injuries are more to be encouraged, than those for compensating or punishing such injuries when committed.*"(c) In the ordinary transactions of life, when it is *expected* that an injury, not yet even commenced, will be sustained, or that an unjust action will be prosecuted, it will frequently become *absolutely necessary* to take some *precautionary measures*, either to perfect the right or to prevent the expected injury, or to secure the best remedy for compensation or the best means

doer, as by letter or bill for discovery, or to discover whether a tenant for life is dead, and may or not a search-warrant be obtained?

10th. Is the complainant the proper party to assert the claim or under any disability; and is the known wrong-doer liable to be proceeded against, or privileged or protected?

11th. Is it fit to accept an apology, or to compromise, or to give any and what indulgence, &c. without previous suit?

12th. Is any other step necessary before the commencement of legal proceedings, as demanding inspection of warrant, giving notice of action, &c.?

13th. Can specific *relief* or performance be enforced, either at law by mandamus, replevin, action of detinue, or summary proceeding; or in equity by bill for specific performance, &c.?

14th. Is it *compulsory* or advisable to refer to *arbitration*, and on what terms?

15th. Is the complainant in possession of sufficient *evidence* to support his claim, and if not, how can he obtain it? If not, then how far should that circumstance influence in the choice or abandonment of remedies?

16th. Before what tribunal, or to what justices, or court inferior or superior, should the complaint be preferred?

17th. Is it necessary or expedient to retain any and what attorney, solicitor, proctor, or agent, to commence and proceed in the suit, and on what terms?

18th. By and against whom, or in whose names, should the proceedings be carried on?

19th. What should be the first process, and should the wrong-doer be arrested or only summoned?

20th. What are to be the pleadings or statements of the complainant's case, whether before justices by information, or at law, or in equity, libel in the spiritual or ecclesiastical court, or in the court of admiralty? Is any further statement of facts requisite as instructions for preparing the same? In what respect will the form of the proceeding vary?

21st. On the behalf of a *Defendant*. Has the proceeding been commenced in the proper court; and if not, then can the defendant stop the same by plea to the jurisdiction or by prohibition, certiorari, &c.?

22d. If there be several claimants in different adverse rights, should there be a bill of interpleader, or motion to the court under the stat. 1 & 2 W. 4. c. 58?

23d. If not, what is the proper defence, plea, or answer?

24th. What should be the subsequent pleadings and proceedings?

25th. How should the *Brief* be prepared for the plaintiff or defendant, and what are the proper forms and points to be alluded to; and is it necessary or expedient to have a consultation with the counsel, and when?

26th. What *evidence* should be adduced for the plaintiff and defendant? Is it advisable to examine witnesses on interrogatives under 1 & 2 W. 4, c. 22, s. 4, and how? Or to file a bill for a commission, &c.?

27th. What should be the conduct of the plaintiff and defendant, and their counsel or attorney or solicitor, previous to and pending the trial or hearing?

28th. What should be the verdict, judgment, or decree; award, adjudication, conviction, or sentence? Whether specially or generally; for any and what debt or damages, &c.; and for any and what costs?

29th. What should be the execution, whether against the person, or personal or real property, and what may be taken?

30th. When satisfaction should be entered; and what the consequences of the omission?

31st. What remuneration should be made by the client to his attorney or solicitor; and of *taxing* the bill of the latter?

(c) *Vengeance* v. *Attwood*, 1 Mod. 202; *Willcock* v. *Windsor*, 3 Bar. & Adolp. 43.

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of defence; or supposing that such measures have already been adopted, the evidence may be insufficient, and it may therefore be expedient to obtain an admission of the fact, or to repeat the measures. So in various cases, whether before the inception of an injury, or after it has been completed, although no preliminary measure may be absolutely *necessary*, yet it will be found of *essential importance* and *utility*, and highly expedient, to take certain steps before the actual commencement of litigation. Thus, even in a Court of *Law*, the mere circumstance of a complainant having, previously to litigation, evinced a sincere desire to avoid it, whether by seeking explanation, or by temperate remonstrance, or by civil request or notice, to the intended defendant, allowing adequate time for consideration, and for obtaining advice on the propriety of resistance; or, on the part of a defendant, his having offered an explanation or a proper apology, or an arbitration, or made a tender or *bonâ fide* offer to pay what he considers the just measure of the complainant's claim; all these steps (independently of moral obligation and gentlemanly feeling) will, in most cases, strongly incline a judge and jury in his favour, so as at least to induce each to listen more patiently to a detailed statement and evidence, when, in case of an intemperate or hasty action, or of a vexatious or uncandid defence, the judge and jury will suspect the veracity even of the evidence adduced by either party. (*d*) No one of experience will deny that very small circumstances and judicious conduct of a party will frequently turn the scale in his favour, and still more frequently influence the amount of damages. (*e*) And if the claim should be prosecuted or resisted in a Court of *Equity*, the previous conduct of the parties will often induce that court, in the exercise of the

(*d*) It has been not unfrequent for inferior practitioners to issue a writ without a previous letter, or at least before it has been possible to comply with a short notice, and even to declare *de bene esse*, as it is technically termed, on the very day of service of the writ, a practice by late salutary rules and enactments very properly repressed. Rule Trin. T. 1 Wm. 4, A. D. 1831; Rules II. & III. Hil. T. 1832; Stat. 2 Wm. 4, c. 39; Rule Mic. T. 3 Geo. 4, Reg. 11; Tidd, on same, page 38, 39.

(*e*) In an instance before alluded to, *ante*, 57, note (*u*), where a lady who had promised marriage was fickle and indecisive, and could not be brought to a decision as to the day of marriage, and afterwards neglected to attend an appointment for the purpose, a celebrated leading counsel, who afterwards filled the highest legal station, upon consultation with the intended plaintiff, suggested the terms of his letter to the lady, fixing a day, and upon such letter being afterwards read on the trial, Lord Kenyon observed, that though the lady then pretended that the plaintiff was beneath her in station, she might have considered herself fortunate in the prospect of possessing, as her husband, a man who could write so sensible and eloquent an appeal to her judgment and her feelings, and thereupon the jury gave much larger damages, principally in respect of such letter, than they would otherwise have done, as several of the jury afterwards declared.

discretionary jurisdiction over *costs*, to give, or withhold, or increase, or diminish them entirely, according to the judicious conduct of the parties. (*f*) Thus, if a bill for an account or for a discovery be filed against a factor or agent, or other party, without first properly applying to him in a civil manner for an account; (*g*) or if a suit for dower has been instituted by a widow, without first applying to the heir to have it assigned, or if, on the other hand, he vexatiously refuse to assign it after proper request; or if a bill of interpleader be filed, without first applying for an indemnity, or if a party be guilty of any other vexatious conduct, he may not recover costs, though in other respects he succeed. (*h*) So, although an executor be always ready, and offer to pay a legacy, yet, if he qualify his offer by imposing terms which he has no right to require, the suit for the legacy will not be deemed unnecessary, and the costs must be paid out of the residue to which the executor may be beneficially entitled. (*i*)

We will, therefore, in this and the succeeding *three* chapters consider those "*precautionary measures*" which frequently are absolutely necessary, and at all times *advisable* for parties to adopt before they precipitately plunge into litigation,—considerations which are important and interesting to every member of society who may wish to know and safely practise and fulfil his relative rights and duties even in the ordinary course of life.

In the present chapter we will consider the *principal* steps to be taken in various situations *before there has been even an inception of injury*. It cannot be attempted to state *all* the various situations of difficulty which may arise even in the ordinary intercourse with society. The first and most general precaution is, in the first instance, *to secure evidence* in support and proof of the right or injury, or of the defence; and then the steps to be taken may be generally arranged under two heads, *first*, cases *independently of contract*; and *secondly*, cases *of contract*. Of the former,

(*f*) See in general 2 Mad. Ch. Prac. 546; and sometimes a party, by instructing or allowing his counsel to make an unfounded or too severe an attack on the character of his opponent, or of even his solicitor, will induce a Court of Equity to visit him with costs; see the case, *post*.

(*g*) *Weymouth* v. *Boyer*, 1 Ves. jun. 416; 1 Mad. Ch. Prac. 216; *Collyer* v. *Dudley*, 1 Turner & Russ. 421. So if a plaintiff is entitled to a discovery, and goes *first* to the defendant to ask for accounts which he in justice has a right to, then if the defendant refuse and the plaintiff is thereby compelled to file a bill for a discovery, the defendant ought not to have costs; for, although they are in *general* to be paid by a party filing a bill merely for discovery, yet if the plaintiff file his bill without trying first to get the discovery, "*in the way in which men acting with each other ought first to ask their rights*," he ought to pay costs, Id. ibid. where it is also said Lord Eldon approved that doctrine.

(*h*) 2 Mad. Ch. Pr. 543 to 575; and see *Collyer* v. *Dudley*, 1 Turner & Russ. R. 421.

(*i*) *Walter* v. *Paley*, 1 Russ. R. 375.

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the instances are principally where it may be advisable to give *notices* not to give credit to a *wife, child, servant, agent,* or *partner*, or of a *bill* or note having been *obtained by fraud, or felony, or lost,* or not to *harbour* an *apprentice* or *servant*, or *not to trespass*, or notices previous to a claim on a hundred, and notices to ascertain any *event* in which the party is interested.

Those connected with contract are cases in which it may be necessary to take steps to *perfect* a right on a *contract*, as notices by purchasers and mortgagees, and trustees of purchasers, or assignments of real property or personalty, either absolutely or as collateral securities; and on behalf of *landlords*, and notices to qualify certain legal liabilities. Then will be shown how to perform conditions precedent, or to make formal requests, and then are considered certain measures to be observed by expected defendants, so as to anticipate and prevent the liability to an action; and lastly, the very important precautions and rules, to be observed by *executors* and *administrators* in the *administration* of assets. It will be our object in this chapter to consider all measures of this nature, *first*, independently of contracts, and, as respects the person, personal or real property; and *secondly*, as regards the perfection of rights founded on *contracts; thirdly*, on behalf of expected defendants; and *fourthly*, precautions of executors and administrators.

III. *Securing evidence* of the Right or of the Injury.(*j*)

III. Perhaps of all the *precautionary measures* that can be adopted when there is the remotest probability of litigation, that of *securing*, in the *first* instance, *evidence* to establish the right, or the injury, or the grounds of defence, is the most important; for if not in possession of adequate evidence, parties should consider themselves in the same situation as if the essential facts had no existence(*k*). Such evidence should therefore be ascertained and well considered in the *first instance*, for after open disagreement, and still more after the commencement of litigation, the wrong-doer will have become guarded and less communicative, and probably will decline any admission, and if he should be certain that *two* witnesses (gene-

(*j*) See end of chapter a repetition.

(*k*) See *post*, as to Bills of Discovery. On a late trial at Kingston Assizes, 1829, a verdict was obtained upon the mere production of an answer in Chancery, upon which Lord Tenterden observed, that was one of the very few instances in which, in his experience, an answer alone had been relied upon to establish a case at law. It oo frequently occurs that upon a client's statements a suit is precipitately commenced without *first* ascertaining the evidence, and sufficient inquiry into the detail of proofs is not made until just before the trial, after much expense has been incurred, and then it will appear that for want of adequate evidence the suit is not sustainable. *This is grossly absurd and culpable negligence.*

rally essential in the *Criminal* Courts to establish the guilt of perjury) cannot prove the fact so as to convict him on an indictment for perjury, he will perhaps, in his answer to a bill of discovery, be hardy enough wilfully to deny, or to so mis-state the facts, or, as is very generally the case, he will so *qualify* his admission that his answer cannot be safely read in evidence against him. (*l*) Hence it may frequently be of the utmost importance to secure an admission, or evidence of the requisite facts in the earliest stage. *How* to effect that desirable object must depend on the various circumstances of each particular case, and the character of the parties interested therein. It may justifiably be effected even by stratagem, though no one would willingly or unnecessarily resort to measures of that description, and sometimes a jury would even suspect the veracity of evidence so obtained. (*l*)

IV. Other precautionary measures in cases *independently* of contract, by giving *Notices*, &c.

IV. Persons are frequently placed in a peculiar situation of risk of loss or injury, and when it may be expedient to adopt and to secure evidence of having adopted *preventive measures* to avoid it, such as giving a *public* or *private notice*, or taking some other step, and which the law allows and requires, provided the party giving the notice has an interest in the subject, and that the character of another be not thereby unnecessarily libelled or affected, and that the means adopted be the best or the only one that could be resorted to; though if these be not observed, the party giving the notice may subject himself to an action or indictment for a libel. (*m*)

1. Notice not to trust a wife. (*n*)

1. If a wife have *illegally absented* herself from her husband's house, or conducted herself extravagantly when there, (*o*) and is likely to endeavour to obtain necessaries or goods on the credit of her husband, he may, and should, in order to protect himself from liability, give a *public notice* prohibiting third persons from trusting her on his credit; and it is advisable also in such a case to give and be prepared to prove a *particular* and private notice or prohibition to every tradesman and person who had been accustomed to deliver goods to the wife on credit; for otherwise, unless in cases where the wife has been guilty of

(*l*) Advertisements in newspapers are very frequently seen, stating, that if a named person will apply at, &c. he will hear of something to his advantage, and when he appears his residence will be ascertained and himself served with a subpœna. This is an innocent *ruse*.

(*m*) *Brown* v. *Croome*, 2 Stark. Rep. 297.

(*n*) Id. ib.

(*o*) *Etherington* v. *Parrot*, 2 Ld. Raym. 1006; 1 Salk. 118, S. C.; *Montague* v. *Benedict*, 3 B. & C. 631; *Holt* v. *Brien*, 4 B. & Ald. 252; *ante*, 60.

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adultery, the husband may be liable until the tradesman has received actual notice: (*p*) and though no notice is absolutely necessary when the wife has been guilty of adultery, (*q*) yet it is always expedient to give the same. (*r*) If such a notice have been given, and the husband receive back his wife, he thereby revives her authority to contract on his credit for necessaries, and impliedly revokes his previous notice. (*s*) When the husband has causelessly turned away his wife, or improperly refused her necessaries, a general notice, or even a special prohibition, is of no avail, and necessaries may be delivered to the wife in defiance of such notice, so as to fix the husband. (*t*)

The notice when given should not unnecessarily calumniate the wife or any third party. It may be in the form in the note. (*u*)

2. Notice not to trust a son or daughter.

2. So with respect to a *son* or *daughter* who has been allowed by the father or mother to obtain goods on his or her credit, and it becomes necessary to determine such authority, a similar *private* notice to each tradesman or person who has been in the habit of delivering goods on the credit of the parent, should be given, or he will continue liable. But as a child has not, like a wife, a *general credit* or power to fix his parent with liability even for necessaries, no *public* or *general* notice is absolutely necessary, for any fresh tradesman would trust the child on his own credit at his peril, but only to those who by the direction or authority of the parent have previously delivered goods on credit to his child. (*v*)

(*p*) *Bolton* v. *Prentice*, 2 Stra. 1214, in notes; *Child* v. *Hardiman*, 2 Stra. 875; *Liddlow* v. *Wilmot*, 2 Stark. 87.

(*q*) *Morris* v. *Martin*, 1 Stra. 647; *Mainwaring* v. *Sanders*, Id. 706; *Rex* v. *Flinton*, 1 B. & Adolp. 227; *ante*, 60.

(*r*) *Norton* v. *Fagan*, 1 Bos. & P. 226; *Gover* v. *Hancock*, 6 T. R. 603.

(*s*) *St. John* v. *St. John*, 11 Ves. 536; *Harris* v. *Morris*, 4 Esp. R. 41.

(*t*) *Harris* v. *Morris*, 4 Esp. R. 42; Selw. Ni. Pri. 5 ed. 275.

(*u*) CAUTION not to trust Mrs. *E. B.*

Suggested form of notice when a wife has absented herself.

Whereas Mrs. *E. B.* my wife, has illegally absented herself from my house, situate at ——, under circumstances which exempt me from liability to pay for any necessaries or goods she may obtain, or to perform any engagement she may enter into, I hereby give *Notice*, that any person who may trust her with any necessaries or goods or money will do so at his peril; and that I am not, nor will be liable in any respect to pay for or repay the same, or to perform any engagement of the said *E. B.* Dated, &c.

A. B. of, &c.

Or, (Caution, &c. as above)

Suggested form of notice where a wife still resides with her husband.

Whereas I have found it expedient and necessary *myself* to purchase *all necessaries* and goods for my wife and my family and establishment at ——, and not to suffer Mrs. *E. B.* my wife to purchase goods or to contract on my behalf: Now therefore I hereby give *Notice* that Mrs. *E. B.* my wife, is *no longer* authorized by me to make any purchases or contract on my behalf, and that I will not be responsible for the performance of any engagement she may enter into. Dated, &c. *A. B.* of, &c.

(*v*) *Ante*, 65.

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3. Notice of authority of agent or servant having ceased.

3. With respect to *agents* and *servants*, it is clear that if a person has been frequently allowed to purchase goods on credit, or do other acts for a principal, and his authority has been put an end to, notice of such revocation must be given, for otherwise the principal will continue liable for subsequent acts, though done without actual authority, but upon the supposition and presumption of a third person that the authority actually continued, at least until it be *generally known* that the agency has ceased. (*w*) In giving a notice of this nature care must be observed to avoid any libellous expressions, or any terms calculated to injure the character of the factor or agent, or servant, or even to insinuate that he is not trustworthy; and when it is believed that he has acted faithfully, it will be advisable to add words to that effect. (*w*) The terms may be as in the note. (*x*)

4. Notice of dissolution of partnership, or not to give credit to a partner.

4. Upon the *determination* of a *partnership* by consent or by effluxion of time, it is *usual* and always expedient for the respective partners to concur in signing and giving *public notice* thereof, lest by fraud or other unforeseen circumstance a retired partner may be afterwards subjected to liability for a subsequent debt or engagement contracted by the other in the name of the late firm. If after the dissolution persons who have previously sold goods or given credit to the firm should, for want of such notice, deliver goods to one of the late partners, who falsely assumes or appears still to act for the firm, all the former partners will be liable, as if the partnership still continued, unless it can be established that there was collusion between the fraudulent partner and such creditor. (*y*) It is usual to concur in a notice in the subscribed form, (*z*) and for each

(*w*) *Nickson* v. *Brohan*, 10 Mod. 110; *Rusby* v. *Scarlett*, 5 Esp. Rep. 76; —— v. *Harrison*, 12 Mod. 46; Moll. 282.

(*x*) CAUTION.—Agency of Mr. *C. D.* for *A. B.* determined.

Suggested form of notice of an agency having been discontinued.

Notice is hereby given, that Mr. *C. D.* of ——, is no longer authorized by me, *A. B.* of ——, to draw, accept, or indorse any bill or note, or purchase or sell goods, or contract on credit or otherwise on my behalf, or to transact any other business for me as my agent or otherwise; but I nevertheless certify my entire approbation of his conduct whilst he was in my employ. Dated, &c. *A. B.*

(*y*) *Parkin* v. *Carruthers*, 3 Esp. R. 248; *Carter* v. *Whalley*, 1 Bar. & Adolp. 13; *Heath* v. *Sanson*, 2 Bar. & Adolp. 291; and *Ex parte Goulding*, 8 Law J. 19.

Suggested form of public notice of dissolution of partnership in Gazette and newspapers.

(*z*) Take Notice, that the partnership lately subsisting between us as (*Coal-merchants*) at ——, has on this —— day of —— by mutual consent been dissolved; and that by the like consent all debts due from or to our late firm will be paid and received by the undersigned *A. B.*, by whom our said business will in future be carried on upon his sole credit and account. Dated this —— day of —— A. D. 1833.

A. B.
C. D.
E. F.

Witness to the signatures of the said parties, *G. H.*

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partner to subscribe his own name, and which constituting a notice, and not an *agreement* to give a notice, need not be stamped. (z) A *public notice* of dissolution will not in general be inserted in the Gazette or other newspapers unless the publisher be satisfied that *all* the partners have *signed* a *consent* to such publication (though there are exceptions); (*a*) and when that cannot be obtained, each retiring partner should, for his own protection, especially when he expects fraud from another retiring partner, give an express and *particular notice* of the actual dissolution to all previous customers, and may, under strong circumstances, even circulate *printed handbills;* indeed such particular and individual notice is in prudence advisable even in cases where a public notice in the Gazette and newspapers has been given; for although such public notice may be sufficient to affect all persons who have *not previously* dealt with the firm, (*b*) yet it may be otherwise as to *previous* customers and connections, who may not have read such Gazette or newspaper. (*c*) The particular notice to be given to each party who has previously had dealings with the firm should in general be in the same terms as the public notice, and be signed by all the partners; and in general in such private notice, in order to further the interest of the new firm, and prevent any prejudicial supposition of insolvency, it is not unusual to state the grounds on which the other partners retire, and their request of the continuance of favours to the new firm.

Supposing the other partners will either not concur in a dissolution, or in giving a public notice thereof, then, if there be reason to fear the improper circulation of bills, or other danger,

(z) *May* v. *Smith*, 1 Esp. R. 283; *Jenkins* v. *Blizard*, 1 Stark. R. 418.

(*a*) On a late occasion, (on 15th Oct. 1832,) the following advertisement, in other names, was given, and is a form that might be adopted when the facts are certain, though it would be prudent to substitute the word *improperly* for *fraudulently*.

Notice not to trust a fraudulent partner.

"Take Notice, that *A. B.* late of No. ——, St. James's, carrying on business in partnership with me at No. ——, as Surgeons, under the firm of "*C. D. and Co.*" has absented himself from business, and is supposed to have left the country. This is to caution all persons from having any dealings with the said *A. B.* in respect or on account of the said partnership, and from taking any bills or notes purporting to be given by "*C. D. and Co.*" the same (if any) having been *fraudulently* made and circulated by the said *A. B.* Dated the day of —, 1832.
E. F. No. -
"Witness, *G. H.*"

(*b*) *Wrightson* v. *Pullan*, 1 Stark. R. 375; 2 Chit. R. 121, S. C.; *Abel* v. *Sutton*, 3 Esp. R. 110; *Triston* v. *Binns*, 2 Car. & P. 104.

(*c*) *Williams* v. *Keats*, 2 Stark. R. 291; *Graham* v. *Hope*, Peake, 154; *Hawkins* v. *Rutt*, Id. 186; *Tenny* v. *Moody*, 3 Bing. 3; *Jenkins* v. *Blizard*, 1 Stark. R. 418; *Wright* v. *Pulham*, 2 Chit. R. 121; *Graham* v. *Hope*, Peake, 155; *Godfrey* v. *Turnbull*, 1 Esp. R. 371; *Munn* v. *Baker*, 2 Stark. R. 255; *Williams* v. *Keats*, Id. 291; *Newsome* v. *Coles*, 2 Campb. 617. In *Munn* v. *Baker*, 2 Stark. R. 255, Ld. Ellenborough said, "A man might be supposed to look into the Gazette for notices of *dissolution*, though he might not look there for carriers' restrictive notices."

the partner objecting should give the others a written notice of dissolving the partnership, and thereby prohibit them from issuing bills, &c.; and he may circulate ***private notices*** to all persons known to the firm, protesting against the injurious proceedings of his copartner, and disclaiming all liability; and he should file a bill against signing or negociating securities in the name of the firm, and praying an immediate dissolution; and should immediately move thereupon, upon affidavit of the impending danger, for an injunction to prevent it. (*d*)

The form of such *adverse* notice may be to the effect in the subscribed note, taking care to avoid any unnecessary calumny on the other parties. The affidavit to support the injunction should concisely state the improper and irregular conduct of the other partner. The subscribed forms may be readily applied to the circumstances of every particular case. (*e*)

(*d*) *Master* v. *Kirton*, 3 Ves. 74; *Ryan* v. *Mackmath*, 3 Bro. C. C. 15; *Newsome* v. *Coles*, 2 Campb. 619; *Lawson* v. *Morgan*, 1 Price, 303.

Suggested form of *private* notice of dissolution of partnership.

(*e*) Sir,—Finding that my partnership with Mr. *A. B.* cannot be carried on advantageously, and that from his having incorrectly and otherwise, than in the due course of business, drawn, issued, or made bills, notes, and other securities in the name of the firm, and intimated that he intends to continue so to do, and on account of other irregularities I am likely improperly to incur much risk, if not actual loss, I beg to inform you, that I have, as far as in my power, put an end to such partnership, and that in future I will not pay any bill, note, or other security issued in the name of my late firm, or upon which the name of the firm, or my name, whether as drawer, maker, acceptor, or indorser, and not my own signature, may appear, unless with my express concurrence; nor will I be in any way responsible for any contracts or engagements that have been or shall or may be made or entered into by the said Mr. *A. B.* without my express consent. And further take notice, that I shall immediately proceed to obtain an injunction against the said *A. B.*, and that I am ready to give you any further information or explanation you may require. Dated, &c.

Notice by one partner to another of intention to dissolve the copartnership, pursuant to a power in deed for that purpose.

Sir,—I hereby require you to take notice, that it is my intention to retire from and determine the copartnership now subsisting between us at Christmas next, in pursuance of the power contained in the deed or articles bearing date, &c., enabling me as therein mentioned to determine the said copartnership. And I hereby further require that you will, on such dissolution of the said copartnership, execute to me such bond of indemnity as in the said articles is mentioned against the debts of the said copartnership, a draft of which bond will in due time be previously submitted to you for your approbation, I being ready to execute any such assignment or assurance as shall be requisite or proper on my part concerning the premises. Dated, &c.

The like, where the partnership was for an indefinite time.

Sir,—I do hereby give you notice, that it is my intention to determine the copartnership subsisting between us in the trade or business of   on, &c. next; and I do hereby require you on or before that day to render a just and true and particular account in writing of all the monies had and received by you for or on account of the said copartnership, and of all transactions relating thereto; and I do hereby give notice in the mean time not to draw, accept, or negociate, or make or cause to be made or executed any bill of exchange or promissory note, or other security, for or on account of or in the name of the said copartnership, or otherwise relating thereto, by means of which I might become liable to make any payment whatsoever. Dated, &c.

Notice in Gazette and otherwise that a partnership will expire on a named day, and that a new firm will continue the trade.*

Notice is hereby given, that the partnership between (*here state the names of the subsisting firm*) in the trade or business of ——, carried on at ——, and elsewhere, will expire on, &c., and that the said trade will be continued by (*stating fully the names of the continuing partners*) under the firm of, &c.

(*To be signed by each member of the retiring firm.*)

* See form, *Gough* v. *Davies*, 4 Price, 202.

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5. Notice of bills or notes having been lost or obtained by felony or fraud.

5. Another instance of the necessity of taking *immediate precautionary measures* and giving *public notice*, is that of a *negociable bill or note* having been obtained by undue means, as by robbery, or by *false pretences*, or *lost*, in which cases, from want of a *previous notice*, it may be negociated and get into the hands of a *bonâ fide* holder, who may become entitled to enforce payment, and the defrauded person, or the loser, may be deprived of all claim, excepting against the person guilty of the fraud, or the finder. (*f*) In case of such a felony, fraud, or loss, *immediate public notice* should be given, stating, as explicitly as the nature of the case will admit, an accurate description of the bill or note, and the time and circumstances of the fraud or loss, with an offer, in case of felony, of a reward for discovery of the offender. So that any person who has read or heard of such notice, and to whom the bill or note might afterwards be offered, may immediately perceive that the latter is the instrument referred to in the notice, and may

Notice in Gazette and otherwise of dissolution of partnership as to one of the firm, and of new firm.*

Notice is hereby given, that the partnership between *A. B.* & *C.* in the trades and business of, &c. and generally, was dissolved on, &c. last, so far as relates to the said *C.*, and that all debts due to the said late partnership are to be paid, and those due from the same discharged at their house in ——, where the business will in future be continued by the said *A.* and *B.* and by *D.*, under the firm of *A. B.* & *Co.* Dated this —— day of ——, A. D. 1833.

A. B.
C. D.

Notice of dissolution, and that one of the partners will continue the trade.

Notice is hereby given, that the partnership heretofore carried on by *A. B.* and *C. D.* ——, at their ——, in ——, has this day been dissolved by mutual consent, and in future the business will be carried on by the said *A. B.* on his separate account, who will pay and receive all debts due and owing to and from the said partnership in the regular course of trade. Witness our hands this —— day of ——, A. D. 1833.

A. B.
C. D.

Notice of dissolution, and who to pay, and requesting accounts.*

Notice is hereby given, that the partnership lately subsisting between *A. B.* and *C. D.* of, &c. heretofore carrying on trade under the firm of *B.* and *D.*, was on the —— day of —— last dissolved by mutual consent: all debts due and owing to the said partnership are to be received by the said *A. B.*, and all persons to whom the said partnership stands indebted are requested immediately to send in their respective accounts to the said *A. B.* in order that the same may be examined and paid. As witness our hands.

A. B.
C. D.

The like in another form.

Notice.—The copartnership carried on for some time past at ——, by *A. B.* and *C. D.* under the firm of *A. B.* and *Co.*, was this day dissolved by mutual consent. Mr. *B.* is empowered to settle all debts due to and by the company.

A. B.
C. D.

The like in another form.

Notice.—The copartnership heretofore carried on at —— by *A B.* and *C. D.* —— under the firm of *B.* and *D.* was dissolved on the —— day of ——, by mutual consent.

A. B.
C. D.

(*f*) *Snow* v. *Peacock*, 3 Bing. 406; Ld. Raym. 738; see modern cases, *Gill* v. *Cubitt*, 3 Bar. & C. 466, &c. Chitty on Bills, 8 ed. 275 to 288. Even after conviction of a felonious stealing a bill, the owner is not entitled to restitution if the bill has got into the hands of a *bonâ fide* holder, 7 & 8 G. 4, c. 29, s. 57.

* See a form in Montefiori's Precedents, 371.

refuse to give value for it, or otherwise receive it, and in the case of a felony, may adopt measures to apprehend the offender. (*g*)

If the notice be too general, or still more, if it mislead, it will be deemed insufficient; (*h*) as if it state the loss of a pocket book, and that the contents are of no use to any but the owner, and do not describe the bills therein. (*i*) Care must be observed to omit any libellous reflection upon any particular person, who might sue for the libel, (*k*) unless in a clear case of felony or gross fraud, when, for the purposes of justice, it may be proper to describe the offender and his associates, so as to lead to their apprehension. (*l*) Duplicates of such notices should be instantly forwarded to all parties to the bill or note, (*m*) and to the Bank of England, and all banking houses to which the securities may possibly be tendered; and printed copies of such notice, in case of felony or fraud, should be immediately left at Bow Street, and other public police offices, and inserted in the Hue and Cry, (a paper circulated by order of the Secretary of State for the Home Department, to announce the perpetration of offences); other copies should be immediately published in the Gazette, and in all the widely circulating newspapers; and notices should be circulated in handbills and placards in the neighbourhood, &c.; at all the expected principal races, fights, large fairs, markets, and places where it is likely that the instrument may be attempted to be circulated; (*n*) and if the securities were bank notes, or of a nature likely to be transmitted to the continent, the like notice in French and English should immediately be given to the bankers and other commercial agents in the principal towns on the continent, and also inserted in their public papers. (*o*) If the owner cannot ascertain all the particulars of the securities, he must *instantly* give the best notice he can, and ascertain the particulars as soon as practicable, and thereupon give another fuller notice. (*p*) And where a party having been robbed of a bill eight days before it was due, neglected to give immediate notice, it was held that he could not recover in trover against a party who discounted the bill six days after the loss. (*q*) The forms of

(*g*) See notice and result in *Bridger* v. *Heath*, Chitty on Bills, 8 ed. 283, note (*a*).

(*h*) Per Best, C. J. *Snow* v. *Peacock*, 3 Bing. 408, 411; *Beckwith* v. *Corrall*, Id. 445.

(*i*) *Beckwith* v. *Corrall*, 3 Bing. 445.

(*k*) *Stockley* v. *Clement*, 4 Bing. 162; *Cohen* v. *Morgan*, 6 Dowl. & Ry. 8.

(*l*) Id. ibid. Chitty on Bills 8 ed. 276.

(*m*) Pothier on Bills, pl. 132.

(*n*) See the proceedings in *Bridger* v. *Heath*, Chitty on Bills, 8 ed. 283, n. (*a*); *Snow* v. *Peacock*, 3 Bing. 406; 11 Moore, 286, S. C.

(*o*) See *De la Chaumette* v. *Bank of England*, 9 Bar. & Cres. 208.

(*p*) *Bridger* v. *Heath*, Chitty on Bills, 8 ed. 283, 284, n. (*a*).

(*q*) *Beckwith* v. *Corrall*, 2 Car. & P. 261; 3 Bing. 445, S. C.

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the notices given in the notes have been adopted and approved in practice, and in an action brought for the publication of the second, it was held not to be libellous, at least without an innuendo, and proof that the plaintiff was the person designed in the notice, and intended to be charged with having forged the acceptance. (*r*)

(*r*) *Stockley* v. *Clement*, 4 Bing. 162.

CAUTION. BILLS OF EXCHANGE.

Notice that bills have been obtained by false pretences.

Whereas three several bills of exchange, bearing date respectively the 18th of July last, drawn by one James Tompkins upon and accepted by me, the undersigned Jonathan Atkins, namely, one for 100*l*., at three months after date; another for 200*l*. at six months after date; and the other for 300*l* at nine months after date, were severally obtained from me under *false pretences*, and without any consideration whatever for the same: Now I hereby CAUTION all persons from receiving or negociating the same, or any of them. Every information respecting the above bills will be given on application to Mr. ——, at No. —, —— Street, London. Dated this —— day of ——, A. D. ——

JONATHAN ATKINS.

See this form in *Stockley* v. *Clement*, 4 Bing. 162. An advertisement in a newspaper as follows:

TO BILL BROKERS and OTHERS. CAUTION. REWARD.

Notice of forgery of acceptance or fraud.

"Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26, 1825, and purporting to be drawn by one John Stockley (the plaintiff) upon and to be accepted by the Dowager Lady P. Turner, for 6000*l*. with interest, payable twelve months after date to the order of the said J. Stockley: I do hereby give NOTICE, on behalf of the Dowager Lady P. T., that she has not accepted such bill, and that if her name should appear on any such instrument, the same has been *forged*, or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by *fraud*, in total ignorance, on her part, of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument shall be handsomely rewarded. Dated, &c.

THOMAS BINNS.

This was held not a libel on Stockley, at least without innuendo and proof that he was the person designed to be charged with having forged Lady P. Turner's name.

Notice of felonious stealing, or loss of a bank note.*

Twenty-five Guineas REWARD. LOST or STOLEN, from the person of a gentleman at the Russel Street entrance into the pit of Drury Lane Theatre, on Monday night last, a Bank of England note, value 200*l*. numbered 7071, and dated 3rd February, 1827. When lost it was divided into halves. Whoever will bring the same to Messrs. ——, Law Stationers, Royal Exchange, if lost; or if stolen, will give such *information* as shall lead to a conviction of the offenders, † shall receive the above reward. Dated this —— day of ——, A. D. ——

Notice where a bill for an *injunction* has been filed.

TO BILL-BROKERS and OTHERS.—Notice is hereby given, that a BILL has been filed in the High Court of Chancery, by *A. M.*, of ——, tailor, against *W. B. S.*, of —— warehouseman, (trading under the firm of *S.* and Son, Manchester, warehousemen,) *W. W.*, late of Paternoster-row, accountant, (who it is believed has left this country,) and *J. J. S.*, of ——, solicitor, and *J. E.*, of ——, aforesaid, tailor, which bill does pray that a certain bill of exchange, dated on or about ——, 1832, for the sum of £400, payable 3 years and a half after the date thereof, to the order of *W. S.* and Son, and purporting to be accepted by the firm of *E.* and *M.*, may be delivered up to the said *A. M.* to be cancelled; and that the said, &c. may be restrained, by the order and injunction of the said Court of Chancery, from indorsing or otherwise negotiating and parting with the said bill of exchange. And the public are hereby cautioned against receiving or negociating the said bill of exchange, as payment of the said bill of exchange will be resisted by the said *A. M.* Dated this 9th day of March, 1833.

B. H. S., —— street, Solicitor for the said *A. M.*

* N. B. This form was adopted in *Bridger* v. *Heath*, Chitty on Bills, 8 ed. 283, 284, note (*a*).

† This alternative is material to avoid violations of stat. 7 & 8 G. 4, c. 29, s. 59.

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In framing such notice care must be observed not to contravene the enactment, that if any person shall publicly advertise a reward for the return of any property stolen or lost, and shall in such advertisement use any words *purporting that no questions will be asked;* or shall make use of any words in any public advertisement, purporting that a reward will be given or paid for any property which shall have been stolen or lost, *without seizing or making any inquiry after the person* producing such property; or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property; or if any person shall print or publish any such advertisement; in any of the above cases, every such person shall forfeit 50*l.* for every such offence, to any person who will sue for the same by action of debt, with full costs of suit.(*s*)

Loss of other property.

These rules affecting the loss of negociable securities may readily be applied to the loss of *any other property*, and should be observed in order to *prevent* third persons from purchasing or receiving the property; for although after prosecution of the offender restitution may be attainable by law, yet the proceeding for that purpose is usually attended with increased trouble and expense.(*t*) With respect to *horses* there is a peculiar enactment enabling the owner to seize the same, unless they have been regularly sold in market overt in a prescribed form.(*u*)

6. Notice of apprentice or journeyman having illegally absented himself.

6. In case an *apprentice* or *servant*, or a *mere journeyman*, hired for an unexpired term, or to complete some unfinished work, (*x*) absents himself, then to fix any third person with liability to an action for continuing to harbour him, he must receive a general or particular *notice* of the circumstances. For although if he *took* or *enticed* the party away he would be immediately

(*s*) 7 & 8 Geo. 4, c. 29, s. 59.

(*t*) Id. ibid.

(*u*) *Ante*, 132, 133; see Burn's Justice, tit. Horses.

(*x*) *Hart* v. *Aldridge*, 1 Cowp. R. 54. In *Gunter* v. *Ashton*, 4 J. B. Moore, 12, the plaintiff recovered a verdict for 1,500*l.* damages, for a conspiracy to seduce away, and actually seducing several journeymen piano-forte makers from plaintiff's employ to work for defendant, by improper representations and promises, in order to prevent plaintiff from ability to complete a contract with defendant, and thereby to subject him to loss of the contract and large stipulated damages. See further next chapter.

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liable to an action without previous notice,(*y*) yet a notice must precede any suit for merely detaining or harbouring.(*z*) The subscribed form of notice may be adopted.(*a*)

7. General and particular notices not to trespass.

7. Under this head of *precautionary measures* may be classed *general* and *particular notices not to trespass on land.* It is not absolutely essential to a right to sue for such a trespass that any previous notice should have been given; (*b*) but judges and juries in general discountenance and discourage actions for petty trespasses on land, unless the trespass has been *wilful;* and it is enacted, that in such actions the plaintiff shall recover no more costs than damages, when the verdict is for a sum under forty shillings, unless the judge shall certify upon the back of the record that the trespass was *wilful and malicious,* in which case the plaintiff shall have *full costs,* however small the damages.(*c*) It is therefore always prudent before the commencement of any proceeding against a trespasser on land, to be secure in ability to prove that he had received a notice not to trespass, and *afterwards wilfully* persevered in intruding. After which notice it is usual for juries to give larger damages, or at least for the judge to *certify* that the trespass was wilful and malicious, so as to entitle the plaintiff to full costs.(*d*) It was formerly supposed that after proof of such a notice, and a subsequent trespass, the judge was *bound* to certify.(*e*) But that doctrine was afterwards overruled, and though *usual* to certify, a judge may

(*y*) *Reg.* v. *Daniel,* 6 Mod. 182; *Fores* v. *Wilson,* Peake's R. 55; 1 Bla. R. 142; *Hart* v. *Aldridge,* Cowp. 54; *Keane* v. *Boycott,* 2 H. Bla. 511; *Westerdell* v. *Dale,* 7 T. R. 310; *Guppy* v. *Jenkins,* 1 Anst 256.

(*z*) Fitz. N. B. 167, 168; *Empson* v. *Bathurst,* Winch, 51; *Fawcett* v. *Beavres,* 2 Lev. 63; *Adams* v. *Bafealds,* 1 Leon. 240; 1 Bla. C. 429; 3 Bla. C. 142; *Blake* v. *Lanyon,* 6 T. R. 221; *Eades* v. *Vandeput,* 5 East, 39. But after recovery from servant of a penalty no action lies against third persons, *Bird* v. *Randal,* 3 Burr. 1345.

(*a*) CAUTION.

Notice of apprentice or journeyman having absented himself.

John Tompkins, an ABSENT APPRENTICE, (or SERVANT, &c.)

Take Notice, that John Tompkins, now in your service or employ, or harboured by you, is my *Apprentice* for an unexpired term of years, [or is my *Servant* to complete certain work still unfinished,] and is now unlawfully absent from my service without my consent, and that if you or any person shall after this notice *harbour,* or retain, or employ, or cause to be employed or retained, the said John Tompkins, or neglect to cause him immediately to return to my house and premises, situate at there to perform his duty as such apprentice, [or servant,] I shall immediately cause legal proceedings to be instituted against you and all others so offending, for such misconduct; and I further give notice, that I shall attend at your house situate at between the hours of 11 and 12 in the forenoon of the day of instant, there again to demand, and to receive and take away my said apprentice [or servant.] Dated, &c.

To Mr. G. H. and all others.

(*b*) 3 Bla. C. 209, note 3, Chitty's Game Laws, 228, 229.

(*c*) 22 & 23 Car. 2, c. 9, sect. 136; 8 & 9 Wm. 3, c. 11, s. 4.

(*d*) 3 Bla. C. 214, 215; and see *Feize* v. *Rundall,* 1 Esp. R. 225.

(*e*) *Reynolds* v. *Edwards,* 6 T. R. 11.

refuse to do so, especially if there was a *bonâ fide* claim of a right of way or the action should appear litigious. (*f*)

General printed notice not to trespass.

When no particular trespasser is known, then it is proper to give a *public general notice* upon a board in the form in the note, explicitly describing the land not to be trespassed upon, and prohibiting any trespass thereon, and stating that any person entering without leave will be proceeded against as a wilful trespasser. (*g*)

If a *particular* person be suspected of habitually trespassing, or that he intends to do so, then he should be served with a *particular notice* to the same effect, accompanied with an offer, in case of any doubt, to point out the particular closes in the possession of the party giving the notice, so as to exclude any pretence of his ignorance of the boundary. Care must be taken to secure evidence of any person intended to be sued having read or at least received the notice, and that it was given by the authority of the *occupier* of the land, who must be the plaintiff. (*h*) If after such a notice a party should in defiance of it wilfully trespass, a jury will in general give larger damages; and an instance has occurred where 500*l.* damages were given for a trespass after notice, accompanied with insult, and the court refused to disturb the verdict on account of excessive damages; (*i*) and however small the damages, the judge will in general *certify* so as to enable the plaintiff to recover full costs. (*k*) It is expedient from year to year to renew such notice, but in one case the judge certified although the notice had been served four years before the trespass complained of, and although the defendant was unacquainted with the boundaries, and had endeavoured by inquiries to avoid committing a trespass. (*l*) A notice given by a gamekeeper of a lord of a manor would suffice as to lands or waste in the possession of the lord, because it would be presumed that he acted by the orders of his employer, it being within the general scope of his authority to

(*f*) *Reynolds* v. *Edwards*, 6 T. R. 11; *Good* v. *Watkins*, 3 East, 495; *Harper* v. *Carr*, 7 T. R. 449.

(*g*) The notice may be *verbal*, but it is better in writing, and should be very explicit, showing where the party must not trespass. A general printed notice stuck up, stating that the *Stanmore Association* would prosecute all persons trespassing, but not signed by the plaintiff nor addressed to the defendant, was held to be an insufficient notice not to trespass on his lands. *Sellon* v. *Huntsmen of Berkley Hunt*, Chit. Game L. 2d ed. 229. The form of a *general notice* may be thus, taking care to include enough land of the party whose names are subscribed. CAUTION. TAKE NOTICE, that all trespassers on any land, on either side of the adjoining highway, for half a mile in length and one mile in depth, on each side of and opposite to this notice, will be prosecuted as wilful trespassers, and under the Game Act, and otherwise, according to law. JAMES ATKINS.

Form of general notice not to trespass.

(*h*) *Good* v. *Watkins*, 3 East, 495.

(*i*) *Merest* v. *Harvey*, 1 Marsh. R. 139; 5 Taunt. 442, S. C.; and see 3 Bla. C. 210, note, 5.

(*k*) Tidd's Pract. 9th ed. 968; *ante*, 450, 451.

(*l*) *Reynolds* v. *Edwards*, 6 Term Rep. 11. But see *supra*, note (*f*).

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warn persons off the manor who had no authority to sport there.(*m*)

The particular notice may be to the effect of the subscribed form, signed by all the occupiers of land who concur, or separately by any individual.(*n*)

Supposing there should be any unfounded pretence by

(*m*) *Per* Lord Ellenborough in *Good* v. *Watkins*, 3 East, 498.

(*n*) Parish of and County January, A. D. 1833.

Suggested form of a notice not to trespass to a particular person, and to be signed by *several occupiers*.

Sir,

Take notice that we whose names are subscribed are respectively the occupiers of all the several farms and land, situate and being in the parishes of and in the county of and which are on both sides of the highway, leading from to and extend along the said road in the said parishes for a mile and upwards, and are also upwards of a mile in depth from the said road on each side, [or state the several closes by name and their local situation as fully as possible,] and we do hereby respectively give you notice and require you not to hunt, sport, shoot, or otherwise trespass or walk, or ride into or over, or incite, or encourage, or permit any other person, or hounds, pointers, or other dogs, to enter any part or parts of the said lands, whether in pursuit of game, or rabbits, or foxes, or [illegible]

[illegible] will be p[illegible] against you as a wilful trespasser, and other proceedings will be had against you according to law and the statutes in that case provided. And we further give you notice, that any further information respecting the precise situation of the lands above referred to, may be obtained by you upon application to Mr. at Dated this day of A.D. 1833.

A. B.
C. D.
E. F.
G. H. &c.

Suggested form of a *separate* notice after repeated trespasses.

[Place of Residence and date.]

Sir,—Whereas notwithstanding my several requests to you, to abstain from so doing, you have repeatedly trespassed over my lands, situate in the parishes of, &c. in the county of in pursuit of game and otherwise, and have thereby subjected yourself to an action; and whereas I have hitherto anxiously abstained from litigation, but you have intimated your intention to repeat your trespasses, now therefore *I hereby give you notice* not again to trespass or to hunt, shoot, or otherwise sport, on such my lands, either on horseback or on foot, or by your huntsman, gamekeeper or servant, nor to excite, or encourage, or permit hounds, pointers, or other dogs to enter such lands, and that if you should do so after this notice, I shall immediately proceed in an action against you as a wilful trespasser and otherwise according to the statutes; and I hereby give you notice that the lands above alluded to, are, &c. [here enumerate each field and its exact local situation, and even in doubtful cases deliver a rough but accurate sketch of the estate, and then] and all other my lands in the said parishes, and the particulars of which my bailiff, *E. F.* will upon your application to him at, &c. fully point out to you. Dated, &c. J. B.

To Mr. *C. D.*

Notice not to fish.

Sir,—I do hereby give you notice and require you not to enter, or cause or procure to be entered any of my closes, lands or premises, fisheries, ponds, streams, or watercourses, situate and being in the parish of, &c. in the county of, &c. to angle, or otherwise fish, or attempt to angle or fish, take or carry away any fish from the same, or for any other purpose whatsoever; and in case you do not as yet know the local situation of such my said closes, land and premises, fisheries, ponds, streams and watercourses, or the boundaries or extent thereof; I hereby give you notice that the same will be pointed out and shown to you, upon reasonable application, at my dwelling house, situate at, &c. And I do further give you notice, that in case, after your being served with this notice, you shall commit any trespass upon any part of my said closes, lands, or premises, fisheries, ponds, streams or watercourses, you will not only be proceeded against according to law, as a wilful and malicious trespasser, pursuant to the statute in such case made and provided, but will be otherwise prosecuted for such offence according to law. Dated, &c. *A. B.*

To Mr. and all others attempting to trespass on the above mentioned premises.

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recent usage or otherwise, then it would be advisable in the notice to allude to such unfounded and pretended claim, taking care not by any ambiguity to appear to admit that it is even doubtful, but offering by documents or otherwise to satisfy the trespasser that he has no colour of right; after which, if he should decline receiving the information and repeat the trespass it is probable that the judge would certify that he was a wilful trespasser.

8. Notices that a way erroneously claimed has been stopped, or of danger in a particular place.

8. In other cases, when to put an end to trespasses a party has found it necessary to *obstruct* a disputed way, or where in the enjoyment of his private property he has found it expedient to keep in a yard or close a *dangerous dog*,(o) or if any savage cattle are legally placed in a close through which there is no right of way, but which has *sometimes* been trespassed upon, it is highly proper to give the best *public notice* of the danger, and even particular notice to each individual who has been accustomed, although illegally, to enter the same, or who might not be able to read, or might enter at night; for otherwise, if death or personal injury should ensue, the occupier might be liable even to criminal punishment for the manslaughter, or civilly liable to an action to make compensation.(p) The cases of this description will be more fully noticed when we consider the preventive measures by the act of a party expecting an injury. So it should seem that any person, the situation of whose property might probably otherwise occasion damage to another, is bound to give full notice of the danger; it was therefore held that the owner of the wreck of a vessel, sunk in a public navigable river, ought to give notice of the hidden danger by placing a buoy over, and that if he neglect to do so and injury ensue to another he is liable to an action, although he stationed a watchman near at hand to warn persons against the nuisance.(q)

9. Notice to ascertain any other event in which a party is interested.

9. So if it be important to a wife, or other relation, or any person, to ascertain an event in which he or she is interested, and all other more delicate and private means have failed, a publication by another person under her authority, in a newspaper, framed in terms essentially to obtain sufficient informa-

(o) See observation of Tindall, Ch. J. in *Sarch* v. *Blackburn*, 4 Car. & P. 297; *post*, ch. vii.

(p) *Bird* v. *Holbrook*, 4 Bing. 628; *Ilott* v. *Wilks*, 3 Bar. & Ald. 304; *Jay* v. *Whitfield*, 3 Bar. & Ald. 308; and *Sarch* v. *Blackburn*, 4 Car. & P. 297.

(q) *Harmond* v. *Pearson*, 1 Campb. R. 515.

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tion and not unnecessarily calumnious, may be legal, although it might be construed to cast at least a doubt upon the character of the husband or other party.(r)

But in all these cases avoidable calumny should be omitted; and therefore an advertisement in a public paper strongly reflecting upon the character of a person, who had been declared a bankrupt, was holden libellous; although it was published with the avowed intention of convening a meeting of the creditors, for the purpose of consulting upon the measures proper to be adopted for securing their own interests, it appearing that the legal object might have been attained by means less injurious.(s) So supposing that it be suspected that property of a

(r) See form in this note. *Delany* v. *Jones*, T. T. 43 Geo. 3, (A.D. 1803,) 4 Esp. R. 191. Case for a libel, plea not guilty. Declaration stated that defendant, who then carried on the business of a stationer, intending to charge plaintiff with the crime of bigamy, and to bring him into danger of legal punishment, published the false and malicious libel following, that is to say,

Form of notice to ascertain any

"Ten Guineas Reward. Whereas by a letter, lately received from the West Indies, an event is stated to be announced by a newspaper that can only be investigated by these means: This is to request if any printer or other person can ascertain that *A. B.* Esq. (the plaintiff) some years since residing at Cork, late lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice to *C. D.* (the defendant,) No. 14, Duke-street, St. James's, and they shall receive the above reward." There was an *innuendo*, that the defendant meant thereby to insinuate and to have it understood that the said plaintiff had been and was married before the time mentioned in the advertisement, and had another wife then living, he being then married to one *E. F.* his present wife. The defence relied on, and given in evidence, was, that this advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of making a discovery, which was important for her to know, namely, whether the plaintiff had another wife living? That beside this, from the terms of the advertisement, no direct slander was conveyed, without which there could be no libel. The advertisement might be to discover an heir, the legitimacy of a person, or for such like purpose, which would not be a libel. It was answered by Erskine, for plaintiff, that to constitute a libel it was not necessary that the libel should be apparent to all the world. If a man send an advertisement to a newspaper so wrapped up that, though not intelligible to the bulk of mankind, it is so to minds more intelligent, still it was a libel, and that the libellous tendency of this advertisement could not be mistaken.

Lord Ellenborough, in summing up to the jury, said, "this paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy; you must be of opinion that it does carry such imputation before you can find a verdict for the plaintiff, as that meaning is necessary to make the paper a libel at all. The plantiff's counsel contended that you are to take into your consideration only whether the advertisement conveys a libellous charge against the plaintiff or not; I am of a different opinion; I conceive the law to be, that though that which is spoken, or written, may be injurious to the character of the party, yet, if done *bonâ fide*, as with a view of investigating a fact in which the party making it is interested, it is not libellous. If, therefore, this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know whether she was legally the wife of the plaintiff, or whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case it is necessary for the defendant who publishes the libel to show that he published it under such authority and with such a view. The jury are, therefore, first to say, whether the advertisement imputes a charge of bigamy to the plaintiff, and if they think it does, then to inquire whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel, and the defendant is entitled to a verdict."—Verdict for defendant.

(s) *Brown* v. *Croombe*, 2 Stark. R. 297; and see observations in *Flint* v. *Pike*, 4 B. & Cres. 473; 6 Dowl. & R. 525.

bankrupt has been removed from his premises and concealed, so as to constitute an offence against the bankrupt act,(*t*) an advertisement describing the property and the circumstances of the removal, and the quarter of the town where it is supposed to be concealed, with an engagement to pay the statutory reward upon receiving information leading to a discovery of the offence, may be so framed as almost to designate the offender, and yet avoid so specific a statement as to enable him, whether guilty or innocent, to sustain any action for the publication. Of course, in any advertisement of this nature, care must be observed not to violate the before mentioned prohibition against advertisements, purporting that no questions will be asked, &c. respecting any goods feloniously stolen.(*u*)

10. Precaution before inception of any injury, to fix and keep up boundaries of estates, and to exercise acts of ownership.

10. When *tenants* have been in possession many years, under long or renewable leases, it may be expedient for the owners in fee in certain cases, especially when freehold and copyhold land is intermixed, to obtain from time to time authentic evidence of the proper *boundaries* of the different parts of their estates, and which may have been rendered uncertain by alteration of fences, divisions of closes, and other innovations.(*x*) This may be effected by a proceeding in the nature of a limited parochial perambulation in the presence of young witnesses, and by marking trees, or by fixing other marks, denoting the correct boundary, in the presence, if possible, of the owner of the adjacent property, and sometimes of the lord of the manor or his steward, where copyhold is intermixed, and whose attendance ought always to be required in the presence of several young witnesses. By this means future loss or dispute may be prevented by the consent and agreement of the respective owners in fee; and in case of copyhold, with that of the lord; in the absence of consent, by application to the Court of Chancery, either for an issue or a commission, the same object may be obtained even adversely.(*y*) But in support of such an application two facts must be established, before either will be granted by the court, viz.: *first*, the title to some land may be in dispute; and *secondly*, that the party applying has some

(*t*) 6 Geo. 4, c. 16, s. 120.

(*u*) *Ante*, 448. And according to a recent decision, in advertising a reward, it is expedient to notify that it shall be *paid only* to a party who, *in consequence of and acting upon the notice*, causes the culprit to be apprehended, for otherwise a party giving information, although *from revenge*, will be equally entitled to the reward. *Williams* v. *Carwardine*, Oxford Circuit, *cor* Parke, J. March, 1833, Talford, serj. and Godson for plaintiff, Curwood for defendant.

(*x*) *Ante*, 196; and *post*, ch. viii. In the country there is almost a religious persuasion against removing or effacing boundary or mere stones. "Cursed is he that removeth his neighbour's mere stone."

(*y*) *Post*, ch. viii.

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equitable ground for relief; for if the confusion were occasioned by the party himself, or by those whom he represents, he would be left to his remedy at law by action of ejectment or otherwise, to recover any part of the property from which he has been ousted.(z) So in a bill for a commission to ascertain boundaries, all persons having any interest in the property are necessary parties.(a) It will frequently happen that the same person and his ancestors have been in possession of copyhold as well as freehold, and it would be impracticable without such a proceeding, after many years, to distinguish what is copyhold and what freehold; and hence we have seen that a vendor is not in general to be required to point out precisely what is freehold and what copyhold. (b) But still it may be most important for the party in possession of the whole to ascertain the precise situation of copyhold, for otherwise, if he should, though inadvertently, cut trees for sale on the copyhold part, a forfeiture might ensue; though probably a court of equity would relieve, where the waste was committed in ignorance.(c)

11. Exercising acts of ownership.

11. Besides the keeping up the evidences of boundaries of estates, it is also essential twice or more, within every twenty years of each other, to *exercise* distinct, open and notorious *acts of ownership*, in the presence of young witnesses, over such parcels of land, and other rights, that would be otherwise likely to become disputable. It is especially incumbent on lords of manors to adopt this precaution as to small parcels of waste adjoining the inclosed lands, whether of freeholders or copyholders, for otherwise, after twenty years, the presumption may be that such parcels of waste belong to the owners of the inclosed land. (d) It will not be *absolutely necessary* to eject the wrongful occupier, provided he will attorn, or from time to time make payment or acknowledgment that he is not entitled to the property, but occupies by permission; but it will be safer to have the acknowledgment in writing and duly signed; or, at least, the payment should be evidenced by several young witnesses, and frequently to have the acknowledgment so evidenced repeated. (e)

So, to prevent twenty years' continued user growing into evi-

(z) *Godfrey* v. *Littel*, 1 Russ. & M. 59; *Raley* v. *Best*, Id. 659.

(a) *Raley* v. *Best*, 1 Russ. & M. 659.

(b) *Ante*, 237; and see *Scott* v. *Hanson*, 1 Russ. & M. 131.

(c) See 1 Tho. Co. Lit. 674, in notes.

(d) See observations of Littledale, J., *Doe* v. *Pearsey*, 7 Bar. & Cres. 309, 310; *ante*, 237, 273, 274.

(e) Id. ibid. Bul. Ni. Pri. 104; *Doe* v. *Clark*, 8 Bar. & Cres. 717; *post*, ch. ix. *Of Limitations of Actions*.

dence of *a custom or prescriptive right*, there should be an *open and public interruption continued*, till the persons affected by it have full knowledge of its existence, at least once in every twenty years, or an *acknowledgment in writing* that the easement is only by favour and not of right.(*f*)

On the other hand, a person insisting upon his *right* to land, or to an easement or privilege over the land of another, if interrupted, must not only, within every twenty years, perform acts in assertion of his right, but must, if materially interrupted, *litigate* and bring the intruder to submission within that time or he may lose his right.(*g*)

V. Precautions in cases of contracts. General observations.

V. With reference to *contracts*, upon which so many rights are founded, precautionary measures are still more frequently essential. Here the terms of the contract should generally fix the right, and parties are too apt to complain of the supposed defect in the *law*, when in truth their situation is entirely attributable to their own want of care and circumspection in entering into the contract, and in not introducing terms sufficiently guarded.(*h*) Thus, if a party discount a bill upon the representation of a party presenting it for the purpose, that he is justly entitled to the same, and it turns out otherwise, he will complain that sufficient protection is not afforded *by law* to the *bonâ fide* holder of a bill; whereas if he had, before he advanced his money, applied to the supposed acceptor to know whether it was an available security, and the latter had answered in the affirmative, then he might be precluded from afterwards disputing its validity.(*i*) Again: it has been a popular complaint that the law is imperfect in allowing a vexatious landlord to sustain, perhaps, successive actions for small dilapidations, when in truth the tenant, by his own improvident and unqualified covenant or contract to keep in repair *at all times*, has subjected himself to such actions, when he might have stipulated that no action should be brought, except at the end of the tenancy, without three months' previous notice to repair; nor even then, unless the amount of the dilapidations amounted to 20*l.* or any other named sum. It is a well known and just

(*f*) *Benest* v. *Pisson*, Knapp's R. 60; *Moore* v. *Rawson*, 3 Bar. & Cres. 332.

(*g*) Id. ibid.; and see enactments on 2 & 3 W. 4, c. 71; *ante*, 285.

(*h*) *Ante*, 118 to 120; *Scaife* v. *Tobin*, 3 B. & Adolp. 523, 531.

(*i*) *Leach* v. *Buchannan*, 4 Esp. R. 226; *Cooper* v. *Le Blanc*, 2 Stra. 1051.

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maxim, *vigilantibus non dormientibus leges subservient*, and if parties will make absurd or loose contracts, it is not for the law to unmake them, or exonerate from the obligation to perform their own stipulations.(*j*) Though, in case of *mistake*, we have seen that sometimes at law, and in general in equity, the terms may be *reformed* according to the contract of the parties;(*k*) and *fraud* will at law as well as in equity, when clearly established in evidence, afford ground for relief.(*l*) And equity will relieve against some *catching* bargains.(*m*) It may suffice here to refer to the preceding observations and authorities to establish the necessity for much greater precaution than is usually observed in entering into contracts of every description, and to remark, that, even up to the present time, the most common contracts, as between landlord and tenant, are not framed with sufficient care, however unnecessarily voluminous, verbose and expensive the leases and contracts may too frequently be drawn. We have in the preceding pages suggested how contracts should be framed in general;(*n*) and especially the precautions to be observed in contracts of sureties,(*o*) or guarantees;(*p*) and between vendors and purchasers of personalty,(*q*) or real property,(*r*) or in creating a lien,(*s*) and what words should be introduced in grants and conveyances of rights of way, or common, or other easements.(*t*) It might suffice here to recommend every party about to enter into any contract, or to *sell or buy*, and for his solicitor *previously* to state *in writing* every circumstance and contingency relating to the subject, and well to consider and determine upon the expediency of introducing in the terms of the bargain every proper stipulation and qualification of the bargain, and very *explicitly* to state on the face of the written agreement every possible stipulation that ultimately may be assented to. A fair copy of the proposed agreement should be ready to be signed *immediately* the parties have agreed, lest afterwards either should attempt to change the terms.(*u*) If this course were adopted concisely, instead of crowding agreements and leases

(*j*) *Ante*, 118 to 120, 122.

(*k*) *Ante*, 123, 124.

(*l*) *Per* Ashurst, J. in *Cockshott* v. *Bennett*, 2 Term Rep. 763.

(*m*) Chit. Eq. Digest, tit. Agreement. But not *at law*; see the singular cases, *Thornborow* v. *Whitaker*, 2 Lord Raym. 1164; *James* v. *Morgan*, 1 Lev. 111; *Farrant* v. *Olmius*, 3 Barn. & Ald. 692. But unless where a *specific sum* is to be paid, the *jury* may give small damages for the breach of an *absurd contract*, 1 Lev. 111. and 3 Chit. Commercial L. 100.

(*n*) *Ante*, 113 to 124; 6 Ves. 34; *Agar* v. *Macklen*, 2 Sim. & Stu. 420; 1 Meriv. 15.

(*o*) *Ante*, 82, 83, 122.

(*p*) *Ante*, 126 to 130; *post*, 459, &c.

(*q*) *Ante*, 125, 126; *post*, 463, &c.

(*r*) *Ante*, 122.

(*s*) *Ante*, 293 to 300; *post*.

(*t*) *Ante*, 156 to 168, 211, 214.

(*u*) *Ante*, 293, 294, note (*b*).

with numerous synonymous words, much vexatious litigation and expense would be avoided.(*x*)

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Precautions in some particular contracts.

We will now consider some precautionary measures which should precede, or accompany, or follow the completion of contracts, particularly between *vendors* and *purchasers* whether of personalty or realty; *mortgagees* whether legal or equitable; and between *landlord and tenant; carriers;* and parties claiming *a lien.*

1. Precautions by a purchaser or mortgagee of *personalty.*

1. A *purchaser* of *goods,* or other tangible *moveable chattel,* should also observe some precautionary measures, as giving notice and obtaining an acknowledgment of his right from all third persons having the custody of them, before he pays his money; for after such acknowledgment the party making it could not dispute his title.(*y*) He must also take care and have all usual documents delivered to him, or another person may have a better title.(*z*) A party taking one part of a *bill* in sets, unless that part has been accepted, should ascertain what has become of the others.(*a*) We have seen that before advancing money on a purchase or discount, or otherwise acting upon any *chose in action* or security, a party, to be secure, should obtain good evidence that no other person has any objection to its validity; and for that purpose should apply to the acceptor, drawer and indorsers, to ascertain whether he may safely take the security.(*b*) And with regard to bills of exchange and promissory notes, no one should take them from a stranger, or under any suspicious circumstances, for if it should turn out that the same have been stolen or lost from the real owner, and the former has not taken due precautions, the latter may still be entitled to the same, and the party so taking may lose the amount.(*c*)

Taking possession and giving notice of assignment of a debt or chose in action, or of a ship at sea.

Precautionary measures are still more essential on the behalf of a party who has purchased, or had assigned to him as a *collateral security,* any *personal property,* or ship at sea, and especially debts and *choses in action.* If the thing itself be tangible and capable of delivery, then, to be *perfectly secure,* possession should in general be taken, and the former owner must not be suffered to have even a *concurrent possession,* unless authorized

(*x*) See suggested stipulations between landlords and tenants, *post.*

(*y*) *Gosling* v. *Birnie,* 7 Bing. 339.

(*z*) *Lang* v. *Smith,* 7 Bing. 284.

(*a*) *Holdsworth* v. *Hunter,* 10 B. & Cres. 449; *Lang* v. *Smith,* 7 Bing. 294; Chitty on Bills, 8th ed. 176, 177.

(*b*) *Ante,* 457, note (*h*).

(*c*) *Ante,* 457; Chitty on Bills, 8th ed. 275 to 297.

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by the terms of assignment, and which is sometimes hazardous.(*d*) If the thing itself were at a distance and incapable of immediate delivery, as in the case of a ship at sea, it was held that then all the documents relating thereto must be delivered, and all due measures taken to *register the title*, and actual possession should be taken on arrival.(*e*) But the law as respects the necessity for taking possession of *ships* was expressly altered by the present Bankrupt Act, 6 Geo. 4, c. 16, s. 72, which provides that the doctrine of a bankrupt being a reputed owner of a *ship or vessel* shall not extend to invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a *security for a debt*, either by way of mortgage or assignment, *duly registered* according to the provisions of the Registry Act, 4 Geo. 4, c. 41; still however it will be observed, that a *due register* of the contract of transfer is absolutely necessary to prevent the operation of the bankrupt laws.(*f*) As to other *moveable* personal property, if a *trader* be allowed to continue to be *the reputed owner* up to the time of his act of bankruptcy, his assignees will in general be entitled to the property, although in truth he be not the real owner.(*g*) But with respect to *fixed* stills and machinery in mortgage, it would be otherwise.(*h*)

The necessity for taking possession of personalty qualified.

We have seen that if the deed or instrument of assignment do not give any *immediate* right of possession, then the not taking it is no badge of fraud.(*i*) And the absolute necessity for the purchaser or assignee of *moveable goods*, assigned as a security for a debt, *immediately to take possession*, even when he *might legally do so* according to the terms of his security, has

(*d*) *Ante*, 107; *Edwards* v. *Harben*, 2 T. R. 587; *Hodgson* v. *Le Bret*, 1 Campb. 236, in notes; Id. 333. But see *Martindale* v. *Booth*, 3 Bar. & Adolp. 498; *Joseph* v. *Ingram*, 1 J. B. Moore, 189; *Benton* v. *Thornhill*, 2 Marsh. Rep. 427.

(*e*) *Marr* v. *Glennie*, 4 Maule & Selw. 240; *Monkhouse* v. *Hay*, 4 Moore, 549; 2 Brod. & B. 114; 8 Price, 256, S. C.

(*f*) 6 Geo. 4, c. 16, s. 72.

(*g*) 6 Geo. 4, c. 16, s. 72. "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels whereof he was reputed owner, or whereof he hath taken upon him the sale, alteration or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission; provided that nothing herein contained, shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act of parliament, made in the fourth year of his present majesty, entitled, 'An Act for the Registering of Vessels.'" See the cases as to *reputed ownership* of a *bankrupt in general*. *Lingham* v. *Biggs*, 1 Bos. & Pul. 82; *Toussaint* v. *Hartop*, Holt, C. N. P. 335; *Lingard* v. *Messiter*, 1 Bar. & Cres. 308; 2 Dowl. & R. 495, S. C.; *Storer* v. *Hunter*, 3 B. & Cres.; but see *Shaftesbury* v. *Russell*, 1 Bar. & Cres. 666; 3 D. & R. 84.

(*h*) *Horn* v. *Baker*, 9 East, 215.

(*i*) *Ante*, 107; *Edwards* v. *Harben*, 2 T. R. 587; *Gross* v. *Neale*, 5 Moore, 10; *Martindale* v. *Booth*, 3 Bar. & Adolp. 498, *where see the form of such a deed, which may be properly adopted.*

by a recent decision been much qualified; and the suffering the assignor to continue in possession, is not now to be deemed as *necessarily* a badge of fraud, but is only a circumstance which with others may be left to a *jury* to determine whether or not the transaction and possession were fraudulent; and it should seem that, provided all the creditors of the assignor had *immediate notice*, (which should always in prudence be given,(*k*) or possession taken,) or knowledge of the assignment, and the assignor be not a *trader*, he may now safely, in many cases not affected by the peculiar bankrupt laws, be suffered to continue in possession, although by the terms of the assignment the assignee *might legally* take possession. (*l*) And even

(*k*) The following form of notice may be adopted and sent to each creditor of the assignor whose name can be ascertained. But even a *bonâ fide* purchase *might* be void if a purchaser know at the time that the vendor has an action pending against him, and that he sells with a view to avoid an *expected execution*, and not to satisfy it out of the purchase money, but to apply the same to his own use. See observations of Ld. Ellenborough in *Sheriff* v. *Wilks*, 1 East's Rep. 51.

Suggested form of notice of assignment of *personalty* as a security, &c.

Sir,—Take Notice, that by assignment (*or* bill of sale) dated, &c. *G. H.* of, &c. assigned and conveyed all (*&c. stating the property assigned, as all his household goods, chattels, and effects, then being in his house and premises, situate, &c.*) for just and lawful consideration, and to secure the payment of £—— at certain time therein mentioned, with authority to me to enter at any time and take and carry away, and dispose of to my own use the said property, but with power and permission to the said *G. H.* in the meantime to use and occupy the same goods, chattels, and effects; and which assignment I am ready to show to you upon any reasonable application and notice for that purpose. Dated, &c. Your's, &c.

To Mr. *A. B.* of, &c.

(*l*) *Martindale and another* v. *Booth and others*, 3 B. & Adolp. 498. The facts were these:—*A.* being indebted to *B.* in the sum of £10 for goods, applied for a further supply upon credit, and for a loan. *B.* refused to grant either without security; and it was then agreed that *A.* should give a bill of sale of his household furniture and fixtures, and that *B.* should give him credit for £200 on that security. Before the bill of sale was executed, *B.*, upon the faith of such agreement, advanced to *A.* £90 in money and goods, and afterwards, on the 8th March, 1828, *A.* executed a bill of sale, whereby, in consideration of the debt of £100, he bargained and sold to *B.* all his (*A.*'s) household goods (*without any schedule*) and furniture, &c. with a *proviso* that if *A.* should pay the £100 by instalments, the first of which was to be due on the 7th June, the deed should be void; but in default of payment of any of the instalments at the times appointed, it should be lawful, although no advantage should have been taken of any previous default, for *B.* to enter upon the premises and take possession and sell off the goods. There was a further proviso that *until such default* it should be lawful for *A.* to keep possession of them. In 1823 *A.* had given a warrant of attorney to *C.* and *D.* as security for a debt of £1100; and they in Nov. 1828 entered up judgment and sued out a *fi. fa.*, under which the sheriff seized the goods. It was held by the Court, in an action of trespass brought by *B.* against the sheriff, that under these circumstances the bill of sale was not fraudulent, by reason of *A.*'s having continued in possession; and that after a conveyance of goods and chattels, want of possession does not *necessarily* constitute fraud as against creditors, but is only *evidence* of it, *that may or may not*, under all the circumstances, induce a jury to find fraud.

Lord Tenterden, C. J., said: I am of opinion that the deed of sale was not absolutely void. Much has been said as to the secrecy attending that transfer, but the observation applies with equal force to the warrant of attorney, which was unknown to the plaintiffs, and which *Combe and Co.* forbore to act upon for so long a time. The consideration for the bill of sale was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable *Priest* to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly *consistent* with the deed; for it was stipulated that *Priest* should continue in possession until default made in payment of

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the possession by a *trader*, if he were not originally the absolute owner of the property, would not necessarily, in the event of his bankruptcy, entitle the assignee to such property. (*m*) This recent decision appears to qualify the former decisions and treatises. (*n*)

Delivery of securities and notice of assignment of *choses in action* and securities of that nature.

In the case of *debts and choses in action*, all securities relating to them must be delivered up, and *notice should be given to the*

all or any of the instalments; and that on such default it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs to enter and take possession of the household goods and furniture. The possession by *Priest* therefore being consistent with the deed, and it having been given in consideration of money advanced to enable *Priest* to carry on his trade, I cannot say that it was absolutely void.

Littledale, J.—I am of the same opinion. The cases show that continuance in possession of goods and chattels by a vendor, after the execution of a bill of sale, is a badge and evidence of fraud; but I think that, under the circumstances of this case, a jury would have negatived fraud. In *Jezeph* v. *Ingram*, 1 J. B. Moore, 189, Dallas, J. denies that *Edwards* v. *Harben*, 2 Term Rep. 587, lays down a general rule that in transferring chattels the possession must accompany and follow the deed. There was in *Jezeph* v. *Ingram* a mixed possession, for the vendee superintended the management of the farm, and was occasionally present. That case however shows the opinion of the Court of Common Pleas to have been, that a change of possession is not in all instances necessary.

Parke, J.—I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J. in *Edwards* v. *Harben*, has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colourable. In *Benton* v. *Thornhill*, it was said in argument, that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J. dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, Gibbs, C. J. at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in *Sheppard's Touchstone*, 224, (7th ed.) "that a bargain and sale may be made of goods and chattels without any delivery of any part of the things sold;" and afterwards, in page 227, it is said, "that the word *gift* is often applied to moveable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing;" and in a note to this passage by the editor, it is said, "that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed; also in a *donatio mortis causâ* there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to *Priest* to enable him to carry on his trade, and his continuance in possession was in terms provided for.

Patteson, J.—There is no sufficient authority for saying that the want of delivery of possession *absolutely* makes void a bill of sale of goods and chattels; *Martin* v. *Podger*, 2 Bla. R. 701, establishes that want of possession is a badge of fraud which is to be left to the jury. Then, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration. Here the possession was consistent with the deed, for the reason already given. The continuance of possession by the vendor is provided for by the deed, and the purchaser was not bound to enter for the first or the subsequent defaults in paying the instalments. That being so, the possession does not show fraud. The judgment of the Court must be for the plaintiffs.—Judgment for the plaintiff.

(*m*) *Shaftesbury, Earl*, v. *Russell*, 1 Bar. & Cres. 666; 3 Dowl. & R. 84; but see *Darby* v. *Smith*, 8 T. R. 82, which establishes, that in case of a *trader*, possession should be taken as soon as he makes default in his engagement, though he were not the *original* owner.

(*n*) Tidd. Prac. 9th ed. 1004, 5; *Lovick* v. *Crowder and others*, 8 Bar. & Cress. 132; *Bailey* v. *Culverwell*, id. 456.

debtor and to all persons having any legal or equitable interest in the property assigned. (*o*) And this doctrine extends not only to securities for the *immediate* payment of money, but also to the assignment of a *post obit bond* or *policy of insurance*, of the assignment of which immediate notice should be given to the insurance office. (*p*) This is particularly necessary when the party transferring is a *trader* or subject to the *bankrupt* laws. (*q*)

But it is also necessary, by the general law, to prevent the party assigning from fraudulently himself receiving the debt, or again transferring the interest to another person, who, by adopting the precautions which the first party ought to have observed, would acquire the better title or *better equity*. (*r*) Therefore it was held where a person having a beneficial interest in a sum of money, invested in the names of trustees, assigned it for valuable consideration to *A*., but no notice of the assignment was given to the trustees; and afterwards the same person proposed to sell his interest to *B*.; and *B*. having made inquiry of the trustees as to the nature of the vendor's title and the amount of his interest, and having received no intimation of the existence of any prior incumbrance, completed the purchase, and gave the trustees notice; it was held that *B*. had a *better equity* than *A*. to the possession of the fund, and that the assignment to *B*., though posterior in date, was to be preferred to the assignment to *A*. (*s*)

Precautions to be observed by vendors of *real* property.

We have in the preceding part stated some precautions to be observed as well by vendors as purchasers, and to which we refer. (*t*) A *vendor* of an interest in *realty* ought to have his title investigated, abstracted, and evidence in proof of it ready to be produced and established *before* he carries his estate to market; for if he sell it with a confused title or without being ready to produce deeds and vouchers, he must be at the expense of clearing it. (*u*) Whereas if these matters had been previously ascertained, he might have avoided difficulties by specially providing against them in the particulars and conditions of sale, and guarding against the necessity of establishing a

(*o*) See the learning in *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, and *Cooper* v. *Fynmore*, 3 Russ. R. 1 to 65, *per tot*.

(*p*) *Williams* v. *Thorp*, 2 Sim. R. 257, 570; *Dearle* v. *Hall*, 3 Russ. R. 1, 12, 13.

(*q*) 6 Geo. 4, c. 16, s. 72. See *ante*, 460, note (*g*).

(*r*) *Dearle* v. *Hall*, and other cases, 3 Russ. R. 1 to 65; and see *post*, as to *Better Equity*, in case of second mortgages or incumbrances on *real property*.

(*s*) Id. ib.; and see the learned judgment of the Master of the Rolls, Id. 12, 13.

(*t*) *Ante*, 292 to 305; no indictment lies, *Rex* v. *Coddrington*, 1 Car. & P. 661; 3 Burn's Jus. 608.

(*u*) *Wilson* v. *Allen*, 1 Jac. & W. 623, 624; *ante*, 295, &c.

title by production of some documents out of his power or the calling for which would require great expense. Besides, if, before he has ascertained from a confidential adviser that he may safely expose his interest to sale, he should do so, he would incur the risk of his defect of title being discovered and disclosed to another party, who might claim and recover the property. (*v*) If he sell generally without qualification, he must speedily make out an unquestionable title, (*x*) whereas if sold excluding inquiry into the title beyond a certain period, and with his own bond of indemnity, he would probably get just as much purchase-money as if he had sold without qualification. He must be cautious also as to the terms of his *advertisement* and *conditions* of sale, by which he would be bound. (*y*) He must not only deliver an abstract of a good title, but also produce the deeds and vouchers, and establish the facts proving it within a reasonable time; (*z*) and though the merely undertaking to deliver an abstract and possession at a particular time does not make it of the essence of a contract, (*a*) yet Courts of Equity are not disposed to extend the doctrine, that the precise time for completing a contract of sale is not material. (*b*) If the abstract delivered is imperfect, then the vendor will have to pay the costs of a suit for specific performance up to the time of the defects being supplied. (*c*) So if the title appear in the abstract not to be satisfactory, and the purchaser on that account refuse to take possession, the vendor will have to account for rents received by him, or which, had it not been for his wilful default, might have been received. (*d*)

A vendor, having agreed to sell, must produce within a reasonable time all documents reasonably required, or he will have to pay costs, though he may ultimately succeed in enforcing a specific performance of the contract of sale; (*e*) though if the purchaser require too much and the vendor produce too little, then neither party will be entitled to costs. (*f*) The vendor should not execute, or at least part with, the conveyance reciting payment of *consideration* money when he has not received *the whole*, without taking adequate security under seal for the payment; for a false recital of payment would be an estoppel and bar to an action at *law* for the purchase-money

(*v*) *Wilson* v. *Allen*, 1 Jac. & W. 623, 625; *ante*, 295, &c.

(*x*) *Ante*, 436, note (*a*).

(*y*) *Elphinstone* v. *Bedreechund*, Knapp's Rep. Privy Council, 344; *ante*, 295; *Scott* v. *Henson*, 1 Russ. & M. 128, as to what misdescription or too luxuriant a description may be excused.

(*z*) *Newall* v. *Smith*, 1 Jac. & W. 264.

(*a*) *Boehm* v. *Wood*, 1 Jac. & W. 419.

(*b*) *Lechmere* v. *Brasier*, 2 Jac. & W. 289.

(*c*) *Wilson* v. *Allen*, 1 Jac. & W. 623.

(*d*) *Wilson* v. *Clapham*, 1 Jac. & W. 36.

(*e*) *Newall* v. *Smith*, 1 Jac. & W. 263.

(*f*) Id. 264.

remaining unpaid, unless merely fraudulent, (*g*) though not so in equity. (*h*)

Precautions to be observed by *purchasers* of *real* property.

On the other hand, a *purchaser* should be cautious in taking possession before an abstract of a good title has been delivered, for taking possession generally waives objections then apparent; (*i*) and a person purchasing leasehold property is supposed to contract with notice of the clauses in the lease, (*j*) and he should, therefore, take care to know them before he agrees to purchase.

A *purchaser* should always, before he parts with his money, have the title-deeds produced and delivered to him, and the conveyance executed in the presence of witnesses not under the controul of the vendor, and who may at all times be readily found. If he should omit to obtain possession of the deeds, and the vendor should afterwards fraudulently again sell the estate, it is true that the vendor might at any time at law recover the deeds by action of detinue; (*k*) for by the execution of the deeds the *estate* or interest passed and also the property in the deeds, even as we have seen if an improper alteration in the conveyance were made. (*l*) But difficulties might arise in equity, (*m*) and at least he would be blameable for thus enabling the vendor to practise a fraud for which he could not be indicted. (*n*) A purchaser should also, if there be an outstanding term or legal interest vested in a trustee, though attending the inheritance, and which cannot immediately be got in, take care to give notice of the conveyance to such trustee, who will thereby be converted into a trustee for the purchaser. (*o*) In *Register* counties the conveyance must also be *registered*. (*p*) And although the actual necessity for a *formal attornment* by the tenants of an estate to the purchaser was put an end to by the statute 4 Ann. c. 16, s. 9, (*q*) so that now the latter can, after the conveyance to him has been executed, by action compel the payment of rent and performance of covenants by the tenant without such attornment, yet the statute provides that no such tenant shall be prejudiced or damaged by payment

(*g*) *Rowntree* v. *Jacob*, 2 Taunt. Rep. 141; *Henderson* v. *Wild*, 2 Campb. 561; *Lamper* v. *Corpe*, 5 Barn. & Ald. 606; Sugd. V. & P. 554, 555, 8th ed.

(*h*) *Coffin* v. *Coffin*, 2 P. Wms. 291; but in equity payment will be presumed after a great length of time, *Bidlake* v. *Arundel*, 1 Cha. R. 93; Sugd. V. & P. 554, note I.

(*i*) *Burnett* v. *Brown*, 1 Jac. & W. 168.

(*j*) *Walter* v. *Maund*, 1 Jac. & W. 181.

(*k*) *Harrington* v. *Price*, 3 B. & Adolp. 170.

(*l*) *Ante*, 304.

(*m*) *Ante*, 304; *Rex.* v. *Coldrington*, 1 Car. & P 661.

(*n*) Id. ibid.

(*o*) See observations in *Dearle* v. *Hall*, 3 Russ. R. 12, 13.

(*p*) *Ante*, 305.

(*q*) See section and notes Chit. Col. Stat. p. 54.

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of any rent to any grantor or conusor, or by breach of any condition for non-payment of rent *before notice* shall be given to him of such grant by the consuee or grantee.(r) Consequently, in order to prevent the tenant from making protected payments to the vendor, in consequence of his ignorance of the sale, it is still necessary to give him *notice* of the conveyance; and it is advisable to give such *notice in writing*, and it may be to the subscribed effect. (s) After such notice, if the tenant should pay his rent to the vendor he will be liable to pay it over again to the purchaser. (t) It is also still highly expedient to obtain from the tenants *a regular written Attornment*, because after the same has been given or after any admission of the purchaser's title, the tenant will not, (u) unless under special circumstances, (x) be allowed to dispute the purchaser's title. And after a tenant has attorned or repeatedly paid rent to a party claiming derivatively from the lessor, the Court will, in an action against him, confine him to one plea, and will not allow him to plead several pleas traversing different parts of the derivative title. (y) The *form* of an *attornment* is subscribed. (z)

(r) 4 Ann. c. 16, s. 10, and see the previous law, Co. Lit. 309 *a*; 2 Bla. C. 288; *Birch* v. *Wright*, 1 T. R. 384—386; and see the cases since the statute, *Moss* v. *Gallimore*, Dougl. 283; *Thursby* v. *Plant*, 1 Saund. R. 234; *Semley* v. *Hodson*, 16 East, 99.

Form of notice to tenants of a conveyance to a purchaser.

(s) SIR, Dated, &c.

I hereby give you notice, that by conveyances duly executed and dated, &c. Mr. *A. B.* of &c. your late landlord and all other necessary parties, duly sold and conveyed all the estate and interest in the messuage, farm and lands, situate at, &c. and which you hold or claim to hold as tenant thereof, and that the right to such estate and premises is now vested in me, and that you must pay to me all rents accruing due since the —— day of ——, A. D. ——; and observe and perform with me all covenants and agreements and terms upon which you hold or claim to hold the said premises.

To, &c. Yours, &c.

(t) *Semley* v. *Hodson*, 16 East, 99; *Moss* v. *Gallimore*, Dougl. 279.

(u) Id. ib.; *Doe* v. *Parker*, Peake, Evid. 304; *Rogers* v. *Pitcher*, 6 Taunt. 202.

(x) *Rogers* v. *Pitcher*, 6 Taunt. 202.

(y) *Strut* v. *Craigh*, Chit. Prac. 134; *Whale* v. *Lenox*, 5 Bing. 12; *Gully* v. *Bishop of Exeter*, Id. 42; 10 Bar. & C. 603, S. C.

Form of attornment before suit.*

(z) Be it remembered, that we whose names are hereunder written, being the several tenants in possession of certain farms and premises, situate and being in the parishes of ——, and in the county of ——, do hereby severally attorn tenants to *A. B.* of, &c. for such parts of the said premises as are in our respective possessions; and we and each and every of us have this day severally paid to the said *A. B.* the sum of 1*s.* upon such attornment, on account and in part of the rent due and to become due from us severally and respectively for and in respect of the said premises; and we do severally and respectively become tenants thereof to the said *A. B.* from the —— day of —— last past. As witness our hands, this —— day of ——, in the year of our Lord ——.

Witness *J. K.* *C. D.* &c.

The above is the usual form. No words *of agreement* should be introduced, that would require an *agreement stamp;* see *Cornish* v. *Sewell*, 8 Bar. & Cres. 471; Chitty's Stamp Act, 119.

* See *Cornish* v. *Sewell*, 8 B. & Cress. 471.

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2. Precautions by *mortgagees*, whether legal or equitable. (*a*)

2. A *mortgagee*, whether of personalty or of real property, when the *legal* interest has been transferred to him, stands in a court *of law* in the same situation as if he were the *absolute purchaser*. In the preceding part we have considered some points relating to mortgagors and mortgagees, whether legal or equitable. (*b*) We also have seen what precautions must be observed by a *purchaser* as well of personalty (*c*) as of realty, and we have noticed many of the rules to be observed by persons taking personal or real property as security for the payment of a debt. (*d*) We have seen that a mortgagee of *personal* property, to be *perfectly secure*, ought immediately to take and keep possession of the chattels. (*e*) But with respect to *real* property, as the right is generally evidenced by title deeds, it is otherwise, and the neglect to take possession is wholly immaterial, as well as regards the realty itself as also all annexations to the same. (*e*) It remains only to notice a few other peculiarities at law and in equity, confined to *legal and equitable mortgages*, whether of real or personal property. The solicitor for a proposed mortgagee should stipulate in writing that the reasonable expenses shall at all events be paid. (*f*) It may be expressly stipulated that a receiver shall be appointed even before default, but if there be only a general preliminary agreement to execute a mortgage upon the *usual or proper* terms, then the appointment of a receiver of rents *before default* in payment of interest, and before the time appointed for repayment of the principal money, being an annoyance as well as considerable expense, would be deemed an unusual, unreasonable and improper stipulation. (*g*)

A mortgagee should be more careful in obtaining possession of all the *title deeds* than even a purchaser, for if he should omit to obtain and keep the same, a *second mortgagee* might have the preference. (*h*) In case also of a mortgage only of the equitable interest, a mortgagee should *give notice* of his security to the trustees in whom the legal interest is vested, by which means they would be converted into trustees for his

(*a*) *Ante*, 333 to 336. It would be beyond the limits of this work to state *all* the precautions to be used by persons when making contracts; but there is one precaution which may be here adverted to, namely, that a *mortgagee* should take care not only to have all the title-deeds, but also to be well assured that the *legal estate* is duly conveyed to him, for otherwise the *real legal owner* may sue him in trover or detinue for the deeds. *Harrison* v. *Price*, 3 Barn. & Adolp. 170.

(*b*) *Ante*, 257, 300, 333 to 336, 319 to 321.

(*c*) *Ante*, 112 to 130.

(*d*) *Ante*, 292 to 301, 459.

(*e*) *Horne* v. *Baker*, 9 East's R. 215; *ante*, 460.

(*f*) See suggested form of agreement, *ante*, 300.

(*g*) In King's Bench, A. D. 1831, decision upon an award expressly reserving that point, *Robson* v. *St. Leger*, in matter of *Frowd and Rose*.

(*h*) *Harrington* v. *Price*, 3 Bar. & Adolp. 170; *Loveridge* v. *Cooper*, 3 Russ. R. 1.

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benefit. (*i*) In register counties the conveyance must also be *registered.* (*k*) A mortgagee should also cautiously abstain from afterwards allowing the mortgagor to have the possession of the deeds, though it has been held that the mere circumstance of a mortgagee of a lease parting with the deeds to the mortgagor, who has pretended that he wants to show them to an intended purchaser, and afterwards, concealing the incumbrance, conveys to a purchaser, will not deprive the mortgagee of the benefit of his security, provided the *purchaser's solicitor* had *any knowledge* of the subsisting incumbrance; (*l*) and it seems there must be either direct fraud, or negligence amounting to evidence of fraud, to induce a Court of Equity to interfere for the purpose of *postponing* a party who insists on the legal benefit of his deed conveying the *legal* estate to him. (*m*) The same regulations of the statute of Anne respecting purchasers extends to mortgagees, who, when they wish immediately to interfere and prevent the mortgagor himself from receiving the rents, must give the tenants the like notice of the *mortgage* and of the necessity to pay the rent to him; for otherwise a payment of rent to the mortgagor would, by the terms of the act, be protected. In general only such notice is given, without requiring *an attornment*, but the latter qualified by a statement, "whilst the said mortgage is subsisting and until a reconveyance has been executed by the mortgagee," would also be advisable, and the subscribed form of notice would suffice. (*n*)

Equitable mortgagee of real property when not secure.

Although the statute against frauds (29 *Car.* 2, c. 3, s. 4,) in general renders invalid any *verbal* transfer of an interest in land, yet we have seen that for some purposes and to most intents between mortgagor and mortgagee, a mere deposit of title-

(*i*) See observations in *Dearle* v. *Hall*, 3 Russ. R. 12, 13.

(*k*) *Ante*, 305.

(*l*) *Evans* v. *Bicknell*, 6 Ves. jun. 174; *Martinez* v. *Cooper*, 2 Russ. R. 198.

(*m*) Id. ib. 217; *Harrington* v. *Price*, 3 Bar. & Adolp. 174.

Notice by a mortgagee not to pay rent to a mortgagor.

(*n*) Sir,

Take notice, that by indentures of lease and release, bearing date, &c. (*date of indenture*,) the release being of three parts, and made between *A. B.* of ——, of the first part; *C. D.* of ——, of the second part; and *E. F.* of ——, of the third part; the messuage, &c. now in your occupation, situate and being in the parish of ——, in the county of ——, were conveyed and assured (amongst other things) to the said *E. F.*, for better securing the payment of the sum of —— and interest, by the said *C. D.* to the said *E. F.* at a certain time in the said indenture of release mentioned, and now past; and which said sum of £—— with a considerable arrear of interest thereon, is still due and unpaid to the said *E. F.* I do therefore, as the attorney of and for the said *E. F.* hereby give you notice not to pay any rent now due or hereafter to become due from you for the messuage, (&c.) to the said *C. D.* or to any other person or persons than to the said *E. F.* or to me as his attorney, or to such other person or persons as shall be duly authorized by him to receive the same. Dated, &c.

To Mr. *G. H.*

Yours, &c. *I. K.*

deeds, with intent to give a lien thereon, is considered to be an *equitable* mortgage and to entitle the creditor to file a bill in equity to compel the completion of a *legal* mortgage. (*o*) Although a verbal deposit may suffice, yet if it be intended to secure *prior advances* or to be a current or continuing security, it is better to be reduced into writing. (*p*)

But this is an insufficient security, for if the deeds have been improperly obtained from the real owner, the latter may maintain trover against the party who might afterwards hold the same, but who has no actual conveyance, and who therefore cannot be considered as a *purchaser;* and even the trustees under a post-nuptial settlement may recover them from the depositee. (*q*) And even where the party who deposited the deeds had a right to do so, it has been held that the deposit *at law* gives merely a right to retain the deeds, and creates no legal interest in the estate, and therefore the party holding the deeds has no defence to an action of ejectment, and must file a bill to obtain a legal mortgage. (*r*) And an *equitable* mortgage by a mere deposit, without express declaration of the intention of the parties, constitutes no security for *prior* advances. (*s*) However, a party holding a lease by way of deposit and as a security, may be compelled to accept an assignment so as to charge him with all the covenants in the lease which he holds. (*t*) To secure the party holding the equitable mortgage by a mere deposit of deeds, he ought to serve upon all known trustees and tenants a *written notice* of such deposit, unless he be sufficiently collaterally indemnified, or from motives of friendship to his

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(*o*) *Ante*, 335; 1 Mad. Cha. 537, 538; *Ex parte Coombe and another*, 4 Mad. R. 249; *Russell* v. *Russell*, 1 Bro. C. C. 269; *Ex parte Haigh*, 11 Ves. 403; *Norris* v. *Wilkinson*, 12 Ves. 197; *Doe dem. Maslin* v. *Roe*, 5 Esp. R. 105; *Richards* v. *Borrett*, 3 Esp. R. 103; *Boson* v. *Williams*, 3 Young & J. 150.

(*p*) *Mountford* v. *Scott*, 1 Turner & Russ. R. 274; but as the Stamp Act, 55 Geo. 3, c. 184, schedule, title Mortgage, imposes the *same stamp* "upon any *agreement* accompanied with a deposit of title deeds as upon a *mortgage deed*, it has become the practice, especially upon mere supposed *temporary loans*, to dispense with any written memorandum containing words of agreement. But still a *mere acknowledgment* in writing of the object of the deposit might be made without constituting an *agreement* or requiring any stamp. The following form for that object has been adopted:—"Memorandum, Mr. *A. B.* has advanced to me *C. D.* the sum of 100*l.*, for which I have placed in his possession my policy for 300*l.* as a security.

C. D.

8th *September*, 1823.

Memorandum of acknowledgment of a deposit of deeds to create an equitable mortgage.

(*q*) *Kerrison* v. *Dorrien*, 9 Bing. 76; *ante*, 336, note (*l*).

(*r*) *Ante*, 335, note; *Doe dem. Maslin* v. *Roe*, 5 Esp. R. 105; 1 Mad. Ch. Pr. 537, 538; *Ex parte Coombe and another*, 4 Mad. R. 249: *Russell* v. *Russell*, 1 Bro. C. C. 269; *Ex parte Haigh*, 11 Ves. 403; *Norris* v. *Wilkinson*, 12 Ves. 197; *Richards* v. *Borrett*, 3 Esp. R. 103; *Boson* v. *Williams*, 3 Young & J. 150.

(*s*) *Mountford* v. *Scott*, 1 Turn. & R. 274.

(*t*) *Ante*, 336, note (*i*).

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debtor resolve to incur the risk of all consequences of the forbearance. (*u*)

An equitable mortgage or alienation of *copyhold* may, we have seen, be effected by a mere deposit of the copies of the *Court Rolls*. (*v*) But we have seen that regularly the transaction and the covenant to surrender should, to perfect the lien, be presented by the homage and entered on the Rolls; (*x*) and even then, we have seen, that in the case of copyhold a *bonâ fide* purchaser may not be prejudiced by such proceeding without his actual knowledge. (*y*)

What is considered a *Better Equity*.

Precautions by giving notices of an incumbrance sometimes give the party what has been termed *a better equity;* the nature of which will be found explained in the subscribed note, (*z*)

(*u*) There are cases in which, by the omission to *give notice*, another party may acquire what is termed *a better equity*, *ante*, 463, and *infra*, p. (*z*), *Foster* v. *Blackstone*. The form of the notice, when the party does not mean immediately to enforce a *legal* mortgage, or to take possession, or to require payment to him of the rents, may be thus:—

Notice of an equitable mortgage by mere deposit of title-deeds.

"Sir,—Take notice that Messrs. ——, of, &c. have deposited in my possession as a lien and equitable mortgage, certain deeds and documents constituting their title and evidence of their right to an estate situate at, &c. and now in the possession of, &c. and to secure the repayment of £——, and interest, and also all further advances and interest thereon; you will, therefore, take notice of this my interest in and claim upon this estate, so that I may at all times retain the same and have a preference against all or any *subsequently* created interest or charge. But until notice to the contrary you are at liberty to pay your rent to the said Messrs. ——. Dated, &c.

To, &c. Yours, &c.

(*v*) *Ante*, 235.

(*x*) *Ante*, 235, note (*s*), 333 to 336.

(*y*) Sugd. V. & P. 8th ed. 759, that the contents of Court Roll are not always notice to a purchaser; and see *Ex parte Warner*, 19 Ves. 202; *Amber* v. *Amber*, 5 Ves. 582; Chit. Eq. Dig. 656, 303, 304.

(*z*) *Foster* v. *Blackstone*, 4 March, 1833, in Rolls Court. In this case, by the effect of certain instruments executed by the late Duke of Marlborough, the Marquis of Blandford, the present Duke, Mr. Coutts, and other trustees, very large estates were limited in trust for the payment of particular debts there stated, either by sale, mortgage, or the grant of annuity. It was provided that, according to the time when the estates were converted, the surplus monies should be paid either to the late or the present duke. The present duke, then the marquis of Blandford, granted in 1813 three very large annuities for life, and in 1814 he borrowed a sum of 20,000*l.* stock from Sir C. Cockerell. After the grant of the annuities the marquis executed a deed, the effect of *which was to charge the trust estates with their payment, and in the following year Sir Charles took a more formal instrument for the purpose of securing his loan*, and by which the marquis assigned over to him all his interest of *whatever nature in the trust estates*, or in the monies to be produced by them. In consideration of these facts, the Master had found that the annuitants were to be considered as incumbrancers *entitled in priority to Sir Charles*, who had taken an exception to the report in that respect. The question for the Court now to decide was, which party was entitled to a *priority of claim?* It was insisted by Sir C. Cockerell that he was entitled to priority, because he had *a better equity*, arising from the nature of his instrument. The annuitants had *only a power of distress*, and a *term created for their* protection, whereas the nature of the case was, in fact, inconsistent with both.

His Honour could no where find in the authorities what in terms was "*a better equity*," but on a reference to all the cases he considered that it might thus be defined:—*If a prior incumbrancer did not take a security* which effectually protected him against *any subsequent dealing* to his prejudice by the party who had the legal estate, a second incumbrancer, taking a security which in its nature *afforded him that protection*, had what might properly be called, "a better equity." In this view of it, Sir C. Cockerell *had not a better equity*. No doubt his deed was more formal, and better suited to the interest which he meant to acquire by it; yet, in the consideration

and which has also been illustrated by a well considered case already referred to.(*a*) And there are many cases respecting the effect of *notice* of a prior *equitable* mortgage.(*b*)

3. Precautions by *trustees*.

3. It will frequently be at least expedient that a *trustee* should give notice to tenants, occupiers, and others, of his legal claim upon the property, whether by *rent charge, annuity or otherwise*, so as not to endanger the interests of their *cestui qui trust*. In the subscribed note a form of that nature is given.(*c*)

4. Precautions by *landlords and tenants* in general.

4. Perhaps there is no contract requiring so much precaution and consideration as that between a *landlord and a tenant*, since it is not limited to a single act or confined to a short space of time, but the reciprocal obligations may and probably will, during a long term of years, be shifted from the original to new

of a court of equity, the informal deed amounted to an equitable charge on the trust estates, and entitled the annuitants to the same remedy which Sir Charles would have acquired by his more formal instrument. On another ground, however, *Sir Charles had a better equity*. The late duke died in 1817; the trust estates were sold between 1817 and 1819, and the whole interest in them, according to the effect of the instruments, vested in the present duke of Marlborough. In 1819 Sir Charles *gave notice of his security to the trustees who were then possessed* of the monies. After that notice, they could never give any title to a subsequent incumbrancer as against Sir Charles; he acquired by it an effectual security against any after-dealing to his prejudice, and therefore in respect of that priority he had a better equity, and was entitled to priority; and see *ante*, 463.

(*a*) See *Dearle* v. *Hall and others*, cases, 3 Russell's R. 1 to 65, where the learning on this subject was ably observed upon; and see *ante*, 463.

(*b*) *Kierson* v. *Mill*, 13 Ves. 118; *Winter* v. *Lord Anson*, 1 Sim. & Stu. 131.

Notice by the trustee of a term for securing an annuity to pay him the rent for satisfaction of arrears, &c.

(*c*) Sir,

Take notice that by an indenture, bearing date, &c. and made between *A. B.* of, &c. of the first part, *E. F.* of, &c. of the second part, and me the underwritten *G. H.* of the third part, and *I. K.* of, &c. of the fourth part; the said *A. B.* for the considerations therein mentioned did give, grant and confirm unto the said *E. F.* his executors, administrators and assigns, for and during the natural life of the said *A. B.* one annuity or clear yearly sum of ——, of lawful money of Great Britain, to be yearly issuing, growing, had, received, and taken by him, the said *E. F.*, by and out of a certain manor, and certain messuages, lands, tenements, hereditaments and premises therein particularly mentioned, situate and being at —— in the county of ——, and comprising amongst other things, certain lands and premises in your occupation; the same annuity or yearly sum of —— to be payable quarterly, at the time and in manner therein mentioned, with power of distress and entry in case of the nonpayment thereof; and for the further better and more effectual securing of the payment of the said annuity or yearly sum of ——, at the times and in manner aforesaid, the said *A. B.* did thereby grant, bargain, sell and demise, the said manor, messuages, &c. (*as before*) unto me the said *G. H.* for a term of — years, if the said *A. B.* should so long live. And I do hereby further give you notice, that there is now due and owing to the said *E. F.*, the sum of ——, for arrears of the said annuity or yearly sum of ——, up to the —— day of —— last; and I do hereby require you not to pay any rent now due, or hereafter to become due, for the aforesaid lands and premises in your occupation or any part thereof, to the said *A. B.* or to any other person than me the said *G. H.* or such other person or persons as I shall appoint to receive the same until the said sum of ——, together with the growing and future payments of the said annuity or yearly sum, and all costs, charges and expences sustained and occasioned by the non-payment thereof, shall have been fully paid and satisfied. Dated, &c. *G. H.* *

To Mr. *C. D.*

* See this form in Mr. Tidd's Forms, 615.

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parties, who afterwards again and again may be changed. Therefore, in entering into a contract of this nature (although the *title*,(*d*) and the *liberality* of the landlord, and the probable industry, character and solvency of the first tenant, no doubt, form principal inducements,) yet those alone are not to be relied upon; for not only the dispositions and circumstance of the *original* parties may change, but the principles and dispositions of unknown parties should be provided against; and hence the great importance of introducing the most guarded stipulations on each side, and powers for either party to determine the tenancy, when by a *change of circumstances* its continuance would be injurious either to one of the parties or to the estate. It is for want of early precaution and circumspect stipulations that most of the litigations between these parties so frequently arise.(*e*)

Suggested *preliminary agreement* between landlord and tenant.

We have before stated the necessity, in contracts between landlord and tenant, to introduce every stipulation that might possibly be essential during a long term, and to specify what shall be done by each party in every possible contingency.(*f*) Every landlord, or his solicitor, should constantly have by him a very full *agreement for a lease*, containing every possible stipulation

(*d*) No proposed lessee should accept a lease or execute a counterpart in cases where he will have to embark a *considerable* capital, or where he will have to pay a *premium*, without being well assured that the lessor has good title to demise. It is not the *practice* to require an inspection of a landlord's title, and it is said that in case of leases of persons of known property, as of the Dukes of Bedford or Norfolk, it would be unreasonable to require it, *Browning* v. *Wright*, 2 Bos. & Pul. 23. But it should seem that *any* proposed lessee has a right to inspect the title *unless it has* been otherwise *expressly* stipulated; and in prudence he frequently should be previously well satisfied of the title, Sugd. V. & P. 8th ed. 306 to 314; *Keech* v. *Hall*, Dougl. 21. At least a lessor could not *enforce specific performance* of an agreement for a lease without producing his title, *Fildes* v. *Hooker*, 2 Meriv. 424; *Purvis* v. *Regner*, 9 Price, R. 488; Sug. V. & P. 308, n.(*u*), 311. But if the *agreement* for the lease *exclude* the right to inspect the title by any terms, then the intended lessee cannot object, see *Spratt* v. *Jeffery*, 10 Bar. & Cres. 249; *George* v. *Pritchard*, 1 Ry. & M. 417. The danger of taking a lease without due inquiry or sufficient covenants is illustrated by *Adams* v. *Gibney*, 6 Bing. 656; 4 Moore & P. 491, S. C.; *ante*, 345. The proposed lessee, when the lessor is a termor, should also see that all rents and taxes have been satisfied.

(*e*) *Ante*, 457. It would be beyond the present object to introduce observations upon *political economy*. But I cannot refrain from observing, that much of the distress of the country, and of the *depressed character* of the labouring class, is attributable to the system of demising agricultural land in *too large farms*, and in requiring large capitals to pay for *in-coming valuations*. If landlords would adopt the old system and restore small farm-houses and corresponding outhouses, and subdivide their estates into *small farms* in varying dimensions, so as to enable industrious and careful workmen to occupy with a small capital, they would find their land better cultivated, and that the race of sturdy farmers and *the former* character of the labouring class would soon be restored.

(*f*) See instances of inconveniences resulting *from the omission*, *ante*, 118 to 120. As to when a custom may regulate in cases where the lease is silent, *ante*, 119 to 121; *Liebenrood* v. *Vines*, 1 Meriv. 15, *post*, 480(*k*); and as to clauses of forfeiture, *ante*, 288; Adams on Ejectment, 3d ed.; Comyn's Landlord and Tenant, ably edited by *Chilton*; Woodfall's Landlord and Tenant, and Platt on Covenants.

on the part of a landlord or tenant that may relate to the description of property proposed to be let, so as not only to suggest every expedient engagement but to avoid the necessity for delay in writing out new stipulations, and merely to require pruning or reduction rather than addition; and which may at once be perfected at the meeting of the landlord and tenant, so that the stipulations in rough, when settled according to the ultimate agreement, may be *immediately* signed by the parties before they separate. If the landlord wish to exclude inquiry into his *title or right* to demise,(g) the agreement should expressly so stipulate, for otherwise it is not clear that he may not be required to produce his title.(h) This agreement may, if necessary, be stamped without paying a penalty within 21 days, on mere payment of the duty of 20s. on agreements.(i) If so stamped, of course it should not contain any words of *immediate demise*, which would amount to a lease and require a 30s. stamp or more, according to the amount of expressed rent; and which also could not after signature be imposed without paying that duty and 5*l*. penalty. A very concise form of such *an agreement* has been already given, but this will necessarily vary according to the nature of the property and the particular stipulations of the parties.(k) The agreement should always distinctly describe or specify the premises to be demised, the term, the rent and times of payment, (which would be otherwise only yearly);(l) what taxes and charges on the premises should be paid by the tenant, and it should particularly specify *all unusual* covenants, and then without further enumeration it may conclude, that all *usual* and *proper* covenants, clauses, provisoes and conditions shall be inserted, and all covenants that may reasonably be advised or required by any named conveyancer in case any doubt or dispute should arise. No honourable landlord, nor his solicitor, would attempt to impose terms which do not provide for and protect as well the proper interests of the tenant as of the landlord; and no such landlord would introduce into an agreement or lease any terms which might at any time, during a long course of years, be justly considered unfair on either side at the time it was entered into. It is a bargain in which the utmost reciprocal good faith is essential, and continued confidence and good feeling ought to endure;

(g) *Ante*, 472, note (*d*), and 293, 294.

(h) *Ante*, 472, n. (*d*); as to what words might suffice, see *Spratt* v. *Jeffery*, 10 Bar. & Cres. 249; *Wilmot* v. *Wilkinson*, 6 Bar. & Cres. 506.

(i) 23 Geo. 3, c. 38, s. 5; 55 Geo. 3, c. 184; *Bousfield* v. *Godfrey*, 5 Bing. 418, 419.

(k) *Ante*, 300, n. (*r*).

(l) *Bristow* v. *Wright*, 2 Dougl. 665.

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and hence every attempt to introduce oppressive terms would be as censurable as they would be unavailing, for unless the tenant can continue to make what is termed an adequate living profit, he could not long continue to pay his rent unless perhaps by exhausting and impoverishing the land. Between sensible landlords and tenants this is and ever will be a *regulating principle*.

What is only an *agreement* for a lease and what a *lease*.

Whether an instrument shall be deemed only an *agreement* for a lease or *an immediate lease* or demise, though with a stipulation for a *more formal* lease, has in many cases been the subject of much controversy and difficulty as well at common law as under the Stamp Act. It should seem that one *general rule* to be relied upon, when the words are ambiguous or contradictory, is, that *when the instrument, in whatever form, contains in itself immediate stipulations to perform acts which would be inconsistent with a mere tenancy from year to year,* (as to paint once in *three* years,) and so that the tenant might be sued *upon that instrument* for not performing that act, then although no lease were afterwards executed, the instrument is to be considered as in itself an *immediate demise,* though it also contain a clause that there shall be a formal lease. (*m*) But when the instrument merely stipulates that *a lease shall* be granted upon certain specified terms (*without,* as in some cases, also adding, " that in the *meantime* and until such lease shall have been made and executed, the party shall pay the rent as aforesaid, and hold the premises subject to the covenants above-mentioned,) then the instrument is merely an agreement and not an immediate demise. (*n*) The distinction between a mere prospective agreement and an immediate demise is very material, for if there be no lease or demise then, at least during the *first year* or until rent has been paid so as to afford evidence of a collateral *demise* from year to year, the landlord cannot distrain for the rent; but can only sue, (*o*) though a Court of Equity would compel the occupier to accept a lease and execute a counterpart pursuant to the agreement. However, until the lease has been executed, the tenant is considered to be impliedly bound to observe and liable to be sued in assumpsit for not observing the terms that he would have covenanted to perform in case the lease had been executed. And this rule prevails so strongly, that if the agreement refer to a lease, which, if it had

(*m*) Per Cur. in *Pinerò* v. *Judson*, 6 Bing. 206, and other cases Adam's Eject. 3d edit. 113 to 119; and *ante*, 254, 255.

(*n*) *Dunk* v. *Hunter*, 5 Bar. & Ald. 322.

(*o*) Id. ib.; *Hegan* v. *Johnson*, 2 Taunt. 148.

been executed, would have contained a clause of re-entry for breach of stipulations, then for the breach of any such stipulations, even before a lease has been executed, ejectment might be sustained against the tenant without waiting for any notice to determine the tenancy from year to year. (*p*)

Suggested terms of a *lease*.

When the property to be occupied is considerable or the term for many years, then the *preliminary agreement* as well as the *formal lease* should fully state all particular and unusual covenants, and it would avoid contest, if it concisely and without the accumulation of synonymous or unnecessary words, (improperly increasing the *amount* of the stamp duty when the words exceed 1080,) expressly state all usual covenants and provide for every possible contingency. The *premises* should be accurately described and demised, and not only with all commons, ways, and other easements and privileges *appendant or appurtenant* to the premises, but also then or heretofore therewith *used, occupied or enjoyed* as part or parcel thereof, or for the more convenient occupation or enjoyment thereof. (*q*) The *exceptions* or reservations of timber, mines, &c. powers to hunt, course, shoot, fowl, fish, &c. with or without others, should then be clearly specified. Then the *term*, with the power for either party, whether landlord or tenant, to determine the same on giving a specified notice. The annual *rent* and increased rents per *acre*, if any. Then who to pay *taxes*, *sewers' rate, and other out-goings*, as well in the present state of the premises as in case of improvements, an increase of

(*p*) *Doe* dem. *Oldershaw* v. *Breach*, 6 Esp. 106; *Doe* d. *Broomfield* v. *Smith*, 6 East. R. 535; *Doe* dem. *Henniker* v. *Watt*, 8 Bar. & Cres. 308; Adam's Eject. 3d edit. 188, 189. But when not, see *Doe* dem. *Wilson* v. *Phillips*, 2 Bing. 13.

(*q*) *Ante*, 156 to 159, 210, 211, 214. See the following case to establish the necessity for such words:—*Barlow* v. *Rhodes*. Court of Exchequer, 12th January, 1833, cor. Lord Lyndhurst, Ch. B., Bayley, Bolland and Gurney, Barons; Mr. Coltman showed cause against a rule of Mr. F. Pollock for setting aside the verdict obtained for the plaintiff in this action, which was tried before Mr. Baron Bolland at the last Yorkshire assizes, and was for breaking and entering a passage of the plaintiff, which the defendant justified under a right of way. The Duke of Devonshire, in May, 1825, put up to sale by auction, in separate lots, certain property, including the *locus in quo*, in the town of Wetherby, whereof he was the owner, and lot 20 was purchased by *the plaintiff*, and lot 24 by the defendant. The conveyance to the defendant, after describing the premises purchased by him as bounded on the north by lot 20, contained the usual words "together with all ways, paths, passages, &c. thereunto appurtenant or belonging." Lots 20 and 24 had been formerly in the occupation of the same person, and the passage in question, which had been previously used with lot 24, although now comprised in the conveyance of lot 20, led from the defendant's house to an ash-hole. For the defendant, it was urged at the trial, that the way having been *formerly* used with the same premises, the right of it now passed under the general words "appurtenant or belonging," but the learned judge who tried the cause being of a different opinion, the plaintiff obtained a verdict. It was now contended for the defendant, on the case of *Morris* v. *Edginton*, in the Common Pleas, that the defendant was entitled to a verdict, for that the word "belonging" clearly gave the right of way in question. But the Court held, that neither the words "appurtenant" nor "belonging," which they treated as synonymous, were sufficient to pass the right of way, unless, indeed, it were a way of necessity, which was the case in *Morris* v. *Edginton*, 2 Bing. 76; and therefore they held the plaintiff entitled to judgment, and discharged the rule.

taxation in respect of which ought to be borne by the tenant, and with power to the lessor to determine the lease or increase the rent in case of any future new tax that would otherwise fall upon him in respect of the premises. Then it should be provided who should make ***substantial repairs*** or ***rebuild***, and who those essential only to keep the premises ***wind and water tight***, and to perform ***external*** painting or ornamental repairs; with a stipulation that all repairs to be done by the tenant should be completed upwards of *three* months, or other specified time, before the expiration of the term, for otherwise the landlord might lose a quarter's rent or more whilst repairing after the expiration of the tenancy so as to render the premises fit for the reception of a new tenant. Then whether the tenant should be at liberty and when to remove any and what ***trees, plants, buildings, fixtures***, or *improvements*, or absolutely that the landlord or in-coming tenant should pay a fixed price for the same, or a certain proportion of the improved value.—Who to ***insure*** and *produce receipts* for premiums.—***Suspension of the rent*** and for what time, in case of destruction by tempest or by act of incendiaries, or by fire originating on other premises, or not attributable to the want of due care of the tenant or others employed by him.—Stipulations on the part of the tenant when required to dig holes of prescribed dimensions for *fresh fruit trees* to be provided by the lessor, and carefully to plant and *preserve* the same and ***all other fruit*** and ***other trees***, in gardens as well as orchards and elsewhere, and whether demised or excepted. Then should follow the *tenant's covenants* to pay rent and to keep the premises wind and water tight, and at stipulated periods to paint outside wood and iron-work, and perform all occasional ***small*** repairs, to prevent the increase of dilapidation that might ensue from neglect of timely small reparation. But the lessor to perform all ***substantial*** or permanent repairs, and to ***provide timber and materials*** essential as well for his as for his tenant's keeping the premises in tenantable condition during the term, should any such become necessary; and to ***rebuild*** within a specified time in case of destruction by tempest or fire, as may be particularly provided for according to the agreement of the parties. Then should follow ***in all leases the tenant's general covenant*** to use and manage, and cause and procure to be used and managed, the premises in a tenant-like and proper manner, and according to the best and most approved mode and course of husbandry, and neither to do nor suffer or permit to be done any waste or other act that might impoverish or injure the same or any part thereof; and that at the expiration of the

tenancy and at all times during the same, the said premises and the trees and plants, hedges and fences thereon growing or being, shall be in *as good* heart, cultivation, *order and condition, and as valuable* to the landlord and to any future occupier as the same were at the commencement of the said tenancy. This stipulation would suffice, but where the property demised is very considerable, and the lessor would wish to have more *precise* covenants *particularly* regulating the course of husbandry, they may be introduced with a *fixed penalty or stipulated damages*, as at £10 per acre or otherwise, for breach of each covenant, so as to prevent a jury from not giving due effect to the general covenant, and to compel them to give the prescribed damages however reluctantly. (r) These express covenants usually relate to and specify the approved or supposed best course of husbandry and of sowing and cropping in the neighbourhood, and usually prohibit the removal of hay or straw or manure off the premises, or at least without an equivalent in lieu; also the times of cutting underwoods and hedges, and the modes of performing the latter; with particular covenants applicable to the last year of the term, and enabling the landlord or in-coming tenant previously to enter and occupy certain parts of the buildings and land; and as to the remuneration to the out-going tenant for ploughing and growing crops, manure, &c. to be paid for by fair valuation or deducted from the rent, or any just claim for dilapidations or breaches of covenant, the damages in respect of which to be valued in like manner. Then should follow a *clause of re-entry*, specifying and limiting what breaches of covenant shall constitute a cause of forfeiture. In modern leases this clause is frequently much too general, and ought justly to be limited to cases of *considerable* damage. Then should follow a proviso for the protection of the tenant and to prevent vexatious litigation, viz. that (excepting as respects the punctual payment of rent) no action shall be brought for any breach of covenant before the expiration of the tenancy, unless three months previous specific notice in writing of the breach complained of has been given, and default made in repairing or performing any other covenant to the extent of 20*l.* damages or other named sum, and that it shall be lawful for the tenant to *tender* the amount of the damages or pay the same into Court; and in case the same should be sufficient, then the lessor should covenant to accept the same with costs, and to

(r) *Farrant* v. *Olmeus*, 3 Bar. & Ald. 692.

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discontinue any pending action. This would prevent a repetition of trifling or vexatious actions so justly complained of.

Other terms.

This is a mere outline of the proper terms of a lease. But the landlord having the *jus disponendi* may annex any terms or conditions to his demise that he may think fit, provided it be not contrary to law; (*r*) and it would be impracticable here to state all the stipulations that may be required. The lessor may and ought, in demises of mines, or even of land, to require the tenant to covenant, (subject to the payment of an annual sum as stipulated increased rent for each servant,) not to hire any labourers who have not already acquired a settlement in the parish, for an *entire year*, or otherwise than by an exceptive hiring, so as to prevent them from acquiring a settlement there, and which might increase the poor-rates, and consequently deteriorate other property of the landlord; (*s*) or the covenant may be to indemnify the parish against the consequence.(*s*) And in this and in all other cases where such covenant would not run with the land, so as to subject an assignee of the lessee to liability, there should be a reserved power to vacate the lease. (*t*)

Provisoes of re-entry.

The clause of re-entry requires more particular consideration. If the lessor wish to reserve to himself, at all times during the term, his choice of the person who shall either have the term or the occupation of the premises, great care must be observed in expressly providing accordingly; for otherwise we have seen that the lessee, and all others claiming under him, has the general power of alienation to any one; (*u*) and as any restraint of this power is construed strictly, (*x*) great care must be observed in using most extensive terms prohibiting alienation or demising or parting with the interest or the possession of the premises, or any part thereof, or of the lease for the whole or any part of the term; (*y*) and against parting with or depositing the lease, (*z*) or receiving lodgers, (*a*) and this not only by the act of the lessee, or his executor, administrator, or assign, but also by proceedings technically termed *in invitum*, or by

(*r*) *Roe* v. *Galliers*, 2 Term R. 133; Adams's Eject. 3 ed. 158, 159.

(*s*) *Congleton* v. *Pattison*, 10 East, 130; *Collison* v. *Lettson*, 2 Marsh. 1; 6 Taunt. 224, S. C.; *Rex* v. *Mursley*, 1 T. R. 694; *Rex* v. *Haughton*, 1 Stra. 83; Burn's J. Poor, 356, 357, 26th ed. This would be particularly expedient in demises of all mines, excepting coal mines, because the lessees of such other mines are not in respect of them liable to the poor's-rate, and yet usually bring a great many workmen into the parish, some of whom become paupers there, and increase the rate to the injury of other property of the landlord in the same parish.

(*t*) Same cases.

(*u*) *Ante*, 242, 243.

(*x*) *Ante*, 288; Adams's Eject. 3 ed. 175, 176.

(*y*) Adams's Eject. 3 ed. 175 to 194; *Crusoe* v. *Bugby*, 3 Wils. 234; 2 W. Bla. 766, S. C.; *Roe* v. *Harrison*, 2 T. R. 425; *Doe* v. *Worseley*, 1 Campb. 20; *Doe* v. *Laining*, 1 Ry. & M. 36; *Roe* v. *Sales*, 1 M. & S. 297.

(*z*) *Doe* v. *Laining*, 1 Ry. & M. 36.

(*a*) Id. ibid.; 4 Campb. 77.

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operation of law, as by bankruptcy, insolvency, execution, or other process or proceeding whatever; (*b*) or by the mere fact of an act of bankruptcy, declaration of insolvency, issuing of a commission, petitioning for discharge under the Insolvent Act, signing any judgment, issuing any execution, or the commencement of any proceeding that might terminate in any execution or process against the estate. (*b*)

So, if it be intended to take advantage of a *breach of covenant* as a cause of forfeiture, the clause of re-entry must be cautiously and *extensively* framed; accordingly it should provide as well for enumerated *omissions* as well as for acts *wrongfully done* or to be done, (*c*) and as well for those here-*inbefore* as here-*inafter* mentioned, or it will not operate. (*d*) However, a proviso for re-entry, "unless the lessee at all times during the term actually and *exclusively occupy, manage*, and *cultivate* the *premises without the control or interference of any other person or persons whatsoever*," extends to all these cases, and seems one of the best stipulations to secure the landlord's object, to prevent his buildings or land being occupied by others. (*e*) And where the lease contained a covenant among others that the tenant should not carry hay off the premises under a penalty of £5 per ton, and then a clause followed which enumerated all the covenants *except the above*, but provided that upon breach of *any of the covenants* the lessor might re-enter, it was held that neither that circumstance nor the stipulation for the penalty of 5*l*. did prevent the clause from applying to the covenant not to carry off the hay, &c. because the words of the proviso were large enough to comprehend it. (*f*) But the safest course is in the clause of forfeiture or re-entry expressly and distinctly to enumerate every act or omission in respect of which it is proposed that the lease shall be forfeited. We have seen that there is no substantial distinction between a clause of forfeiture or a mere proviso for re-entry. (*g*) In each case the landlord, and not the tenant or his surety, can avail himself of the option of treating the lease as void or continuing. (*h*)

Securing possession by warrant of attorney without action of ejectment.

In some tenancies, to avoid the delay and expense of actions

(*b*) Unless *these* be expressly provided against, they are not considered contraventions of a covenant or proviso not to assign, *Doe* v. *Bevan*, 3 M. & S. 353; *Roe* v. *Galliers*, 2 T. R. 133; *Doe* v. *Carter*, 8 T. R. 57, 300; unless *fraudulently* or *purposely contrived* to evade the covenant, *Doe* v. *Carter*, 8 T. R. 300.

(*c*) *Doe* v. *Stevens*, 3 Bar. & Adolp. 299; *Doe* v. *Marchett*, 1 Bar. & Adolp. 715.

(*d*) *Doe* v. *Godwin*, 4 M. & S. 265; approved in *Doe* v. *Stevens*, 3 Bar. & Adolp. 303.

(*e*) *Doe* v. *Clark*, 8 East, 185. Most of the cases upon clauses of re-entry are ably collected and observed upon in Adams on Ejectment, 175 to 198.

(*f*) *Doe* v. *Jepson*, 3 B. & Adolp. 402.

(*g*) *Ante*, 289, 290; Adams's Eject. 3 ed. 157, 158.

(*h*) *Ante*, 290.

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of ejectment for recovery of possession, it might be advisable to require from the tenant a warrant of attorney in ejectment, with a special defeazance enabling immediate judgment and execution in certain specified events. (i)

Precautions by landlords after the lease has been executed.

When a lease or agreement has been made with a tenant that he shall manage a farm as a former tenant did, it has been held that he is not bound in equity to pursue the conduct observed by the former tenant without express notice of such terms, (k) and consequently the landlord in such a case should give the new tenant an explicit notice in writing of the course of husbandry pursued by the former tenant, and which the new occupier is required to observe; (k) and though if the agreement were that the tenant should farm according to the custom of the country, he would in strictness be bound to take notice of all particulars, or inform himself thereof; (l) yet the safest course would be for the landlord to give him a similar notice of the particulars. Every prudent landlord should also *secure evidence* that probably will endure for more than the intended new term, of the state of buildings and fences and cultivation of every part of a farm, and of the condition of the land, growth of timber, underwood, &c. at the inception of the new term.

How to complete a forfeiture.

When a lessor is desirous of *completing* a *forfeiture* of a lease for nonpayment of *rent*, at *common law*, (and which is frequently preferable to a proceeding for a forfeiture under the statute 4 Geo. 2, c. 28, s. 2, which only applies when half a year's rent is in arrear, and there is no sufficient distress on the premises, (m)) the strict observance of certain forms is essential. (n)

First. There must be a demand in fact of the rent, (o) but which may be made by an agent, and without showing his authority unless required. (p)

Secondly. The demand must be of the precise rent due, for if the demand be of a penny more or less, it will be insufficient; (q) and Lord Tenterden said it should not be generally of *the arrear*, but of the quarter's rent by name, and specifying the amount. (r)

(i) Probably also *one* warrant of attorney with one stamp from *several* tenants would suffice, provided there be some *bonâ fide community* of interest or agreement to be responsible for each other, but otherwise not, *Doe* v. *Day*, 13 East, 241; *Bouse* v. *Jackson*, 3 Brod. & Bing. 185; and see *Tolput* v. *Wells*, 1 M. & S. 395, overruling dictum of Lawrence in *Meux* v. *Howell*, 4 East's Rep. 9.

(k) *Liebenrood* v. *Vines*, 1 Meriv. 15.

(l) Com. Dig. Pleader, Notice.

(m) *Doe* v. *Wandlass*, 7 T. R. 117; *Doe* v. *Fachan*, 15 East, 286; *Rees* v. *King*, For. Rep. 19.

(n) See a valuable note, 1 Saund. Rep. 287, note 16.

(o) 1 Saund. 286, note 16; Bro. Demaunde, 19 (j).

(p) *Roe* v. *Davis*, 7 East, 363.

(q) *Fabian* v. *Winston*, 1 Leon. 305; Cro. Eliz. 209, S. C.

(r) *Doe* v. *Paul*, 3 Car. & P. 613.

Thirdly. It must be made precisely upon the day when the rent is due and payable by the lease, to save the forfeiture. As when the proviso is, "that if the rent shall be behind or unpaid by the space of *thirty* (or any other number of days) after the days of payment, it shall be lawful for the lessor to re-enter." A demand must be made on the thirtieth or other last day. (*s*)

Fourthly. It must be made a convenient time before sunset, and the party demanding should wait at the same place upon the premises from the time of the demand until after sunset. (*t*)

Fifthly. It must be made upon the land, and at the most notorious or public part of it; therefore if there be a dwelling-house upon the land, the demand must be at the front or fore-door, though it is not necessary to enter the house, notwithstanding the door be open. But if the tenant meet the lessor, either on or off the land, at any time of the last day of payment, and tender the rent, it is sufficient to save a forfeiture. (*u*)

Sixthly. Unless another place is appointed where the rent is to be paid, in which case the demand must be made at such place. (*x*)

Seventhly. A demand of the rent must be made *in fact*, and so averred in pleading, although there should be no person on the land ready to pay it. (*y*) And the best course is audibly to say, "I, *A. B.* the landlord of these premises, (or I, *G. H.* agent for *A. B.* the landlord of these premises, and duly authorized by him on his behalf, do now here demand of and from *C. D.* the tenant thereof, the payment of £——, now due for one quarter's (or half year's) rent of these premises, and which became due on, &c. last past; and in default of immediate payment thereof, I do now declare that the lease and term, estate and interest of the said *C. D.* of and in these premises will be forfeited, ended, and determined."

Eighthly. If after these requisites have been performed by the landlord the tenant neglects or refuses to pay the rent, then the landlord is entitled to re-enter.

Ninthly. It is to be observed that no *subsequent actual entry*

(*s*) Co. Lit. 202 (*a*), and Hargrave's note 3; *Hill* v. *Grange*, Plowd. 172 (*b*), 173 (*a*); *Clune's* Case, 10 Rep. 129 (*a*); *Kidwelly* v. *Brand*, Plowd. 70 (*a*), (*b*); *Cropp* v. *Hambledon*, Cro. Eliz. 48; *Wood* v. *Chivers's* Case, 4 Leon. 180; *Smith* v. *Bustard*, 1 Leon. 142; *Kirby* v. *Green*, 2 Lutw. 1139.

(*t*) Ibid.; *Tinkler* v. *Prentice*, 4 Taunt. 555; and see *Fabian* v. *Rewmston*, 1 Anders. 252; *Kirby* v. *Green*, 2 Lutw. 1139; *Fabian* v. *Winston*, Cro. Eliz. 209.

(*u*) Co. Lit. 201 (*b*), 202 (*a*); *Maund's* Case, 7 Rep. 28; *Kidwelly* v. *Brand*, Plow. 70 (*a*), (*b*); *Scott* v. *Scott*, Cro. Eliz. 73; *Wood* v. *Chivers*, 4 Leon. 180; *Doe* v. *Wandless*, 7 T. R. 117.

(*x*) Co. Lit. 202 (*a*).

(*y*) *Kidwelly* v. *Brand*, Plow. 70 (*a*), (*b*); 1 Roll. Abr. 458.

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is necessary to be made by the landlord into the land, although the proviso is that the lessor *may re-enter;* but it is sufficient to bring an action of ejectment. (z)

Tenthly. A demand made *after* or *before* the last day which the lessee had to pay the rent, in order to prevent a forfeiture, or off the land, will not be sufficient to defeat the estate. (a)

Eleventhly. If the clause of re-entry for nonpayment of rent be only *in case no sufficient distress be found upon the premises,* then at common law the landlord is bound to search every part of the premises. (b)

The *statute* 4 Geo. 2, c. 28, sect. 2, only applies where there is a clause of re-entry for non-payment of rent, and at least half a year's rent is in arrear and no sufficient distress for rent upon the premises, (c) and unless all those three circumstances concur, the landlord can only proceed for forfeiture at *common law,* as above. (c) But when they do concur, no demand is necessary, although required by the terms of the proviso; (d) and the advantage of proceeding under the statute is, that after a lapse of six calendar months from the time of execution executed, a Court of Equity cannot relieve the tenant, which, if the forfeiture has been at *common law,* such court might do at any time. (e)

Of obtaining a disclaimer.

Whenever it is doubtful whether a party in possession of an estate is so under a lease or hiring, which it may be difficult to prove affirmatively has expired or been determined, it is expedient either to obtain a complete immediate and unconditional *disclaimer,* so as by the occupier's *own act* to constitute his holding *adversely,* and enable the claimant immediately to adopt legal measures for the recovery of the possession; or if that cannot be effected, then without loss of time to serve a sufficient notice to quit.

To obtain and be able to prove a complete *disclaimer,* (f) the claimant, unless the occupier in the first instance absolutely disputes his title without qualification, should serve him with a notice of his claim and of his title, and requiring him to give up possession; or if he can establish any subsisting tenancy, then to produce his lease or agreement, or to state the particulars of

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(z) *Anon.* 1 Vent. 248; *Little* v. *Heaton,* 2 Ld. Raym. 750; *Clarke* v. *Pywell,* 1 Salk. 259, S. C.; *Oates* v. *Brydon,* 3 Burr. 1896, 1897 (*b*).

(a) *Doe* v. *Wandlass,* 7 T. R. 117.

(b) *Rees* v. *King,* For. Rep. 19.

(c) *Doe* v. *Wandlass,* 7 T. R. 117; 1 Saund. 287 a, note 16.

(d) *Doe* v. *Alexander,* 2 Maule & S. 525; Lord Ellenborough, *diss.*

(e) Comyn's Landlord and Tenant, 493; *Doe* v. *Whitfield,* 3 Taunt. 402; *Bracebridge* v. *Buckley,* 2 Price's R. 200.

(f) What is or not a disclaimer, see *ante,* 287; *Doe* v. *Frowd,* 4 Bing. 557.

his holding, and to pay the arrear of rent. Supposing the occupier should thereupon set up a title in himself or a third person, and refuse to admit any right in the claimant, the disclaimer will be complete. (*g*) But if the occupier, without insisting on any adverse right in himself, say that the title is doubtful, and that he is willing to pay rent to the rightful owner, that is no disclaimer, (*h*) and the claimant should then file a bill to discover whether there is any subsisting lease, or should at once serve a proper notice to quit.

Of notices to quit.

When the time of the year when the supposed tenancy commenced can be accurately ascertained, or the occupier himself has stated it, (*i*) then a notice to quit on that precise day, and served half a year before it, will suffice. But otherwise, what is termed a *current notice* should be *signed* by all parties who may be supposed to be landlord, or legally interested, and be *addressed* to and served upon the tenant and occupiers, and no legal proceedings should be commenced until at all events any supposed tenancy has thereby been determined. We have seen that a notice to quit, signed by one of several joint-tenants for himself and co-owners, is sufficient to determine the entire tenancy. (*j*) If there be a subscribing witness, he must afterwards be called to prove it, and therefore if the handwriting of the landlord be well known to the *two* persons, (who in prudence should serve the notice, for fear of the death of one,) it will be better not to have any subscribing witness, and it would suffice for the persons serving one original, at the same time to write their names on the duplicate original notice, and which might be produced and proved by either on the trial. Service of the notice at the residence of the immediate tenant, even on the very last day when the same ought to be served, and although he be absent, would suffice. (*k*) The forms of notices advisable to be given by a landlord or a tenant are subscribed. (*l*)

Notice to determine a composition for tithe.

The rules governing notices to quit, in regard to the time when they should expire, have been considered on principle as applicable to notices to put an end to an agreement to let

(*g*) *Ante*, 482, note (*f*); *Doe dem. Calvert* v. *Frowd*, 4 Bing. 557.

(*h*) *Doe dem. Williams* v. *Pasquali*, Peak's R. 196.

(*i*) *Doe d. Digby*, 3 Campb. 215.

(*j*) *Ante*, 270; *Doe* v. *Summersett*, 1 B. & Adolph. 135, contra to *Doe dem. Fisher* v. *Cuthell*, 2 Smith's R. 83.

(*k*) *Doe dem. Neville* v. *Dunbar*, 1 Mood & M. 10.

(*l*) *Forms—Notices to Quit.*

Notice to quit by a landlord to a tenant from year to year.

Sir,—I hereby give you notice, and require you to quit and deliver up to me or my assigns, on the —— day of —— next, the possession of the message or dwelling-house, ("or rooms and apartments," or, "farm, lands and premises,") with the appurtenances, which you now hold, or claim to hold, of me, situate in the parish of ——, in the county of ——, [but without prejudice to any previous notice to quit, or to my im-

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the occupier of land retain and pay a composition for tithe instead of setting it out. (m) But the form of the notice given in the notes necessarily varies in some respects from the former. (n)

(m) Wyburd v. Tuck, 1 Bos. & Pul. 458. (n) See form, infra.

mediate right to recover the possession of the said premises.* Dated the —— day of ——, in the year of our Lord ——.

Your's, &c. *A. B.*

To Mr. C. D., (*the occupier in possession, as a principal on his own account, or if it be doubtful who is tenant,* "To Mr. *C. D.* or whom else it may concern.")

The like, by an agent for the landlord.

Sir,—I do hereby, as the agent for and on behalf of your landlord, *A. B.*, of ——, give you notice and require you to quit and deliver up on the —— day of —— next, the possession of the messuage, &c. (as in last,) which you now hold, or claim to hold of the said *A. B.*, situate, &c. (as above). Dated, &c., (as above.)

Your's, &c. *E. F.*, Agent for the said *A. B.*

To Mr. *C. D*, &c. (as above.)

The like, by the landlord, where the commencement of the tenancy is doubtful.

Sir,—I hereby give you notice, and require you on the [*ut supra* on a named day] provided your supposed tenancy originally commenced at that time of the year, and if not then, that you quit and deliver up the possesion of the said messuage, &c. (*as above*) at the end of the year of your supposed tenancy, which will expire next after the end of half a year from your being served with this notice; and at all events at the earliest time that I am by law entitled to require you to quit the same. Dated, &c. (as above,)

Your's, *A. B.*

To Mr. *C. D.*, &c. (as above.)

The like, more general.

Sir,—I hereby give you notice to quit and deliver up the possession, &c. which you now hold, or claim to hold of me, situate, &c. at the end of the year of your supposed tenancy, which will expire next after the end of half a year from the time of your being served with this notice. Dated, &c.

Your's, &c. *A. B.*

To Mr. *C. D.*, &c. (as above.)

Notice by a joint-tenant, to determine tenancy of a moiety.

Sir,—I hereby give you notice of my intention to determine on the —— day of —— next, the tenancy, or supposed tenancy, under which you now hold, or claim to hold of me, one undivided moiety or half part, and whatever interest or share I have, or may have, of and in a certain messuage, &c. (*as ante,*) situate, &c. and at all events at the earliest time that I am entitled by law to determine your said tenancy, if any. Dated, &c.

Your's, &c., *A. B.*

To Mr. *C. D.*, &c. (*as supra.*)

The like, by a *tenant* from year to year, of his intention to quit.

Sir,—I hereby give you notice of my intention to quit, and that I shall, on the —— day of —— next, quit and deliver up the possession of the messuage, &c., (*as supra,*) which I now occupy, or which you may insist I hold of you, situate, &c. (*id.*) Dated, &c.

Your's, &c. *C. D.*

To Mr. *A. B.*

The like, by an agent, to determine a composition for tithes.

Sir,—I hereby, as agent for and on behalf of *A. B.*, of ——, give you notice of his intention to determine, and that he will accordingly determine, and that he doth hereby determine, on the —— day of —— next, the agreement or understanding under which you hold and enjoy, or claim to hold and enjoy, or to take or to retain to your own use, (*or,* " the composition payable by you for and in respect of,") all and singular the tithes of corn, &c. (*describing them,*) arising, growing, increasing, renewing, and happening in, upon, from, and out of all and every the several and respective farms, lands and premises, (*or,* " in, upon, from and out of certain lands and premises in your occupation,") situate in the parish of —— in the county of ——, and within the bounds, limits, and titheable places thereof; and that the said tithes will, from and after the said —— day of —— next, be taken in kind: and you are hereby required, after that day, to set out and divide and render the same according to law, in cases when there is no subsisting agreement or composition relating to the same. Dated, &c.

Your's, &c. *E. F.*

To Mr. *C. D.*

* If the tenant's *right* to hold until the appointed day be certain, the words within the brackets are to be omitted.

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Precautions of tenants.

We have shown the prudence, in some cases, of ascertaining the lessor's title,(o) and that all rent to a ground landlord and all taxes have been paid; and these precautions are still more necessary in taking lodgings, although furnished; though, if the tenant's goods be distrained for rent due to a landlord, the tenant may set off or deduct the amount, or sue his immediate lessor; (p) and unless the lease contain a clause that the rent shall cease in case the premises be consumed by fire, the tenant, although he may not be liable to rebuild, should

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Three months' notice to quit, &c. pursuant to agreement in the usual printed demise of a public-house, signed by survivors of original lessors and the present owners and their new succeeding lessee.

Sir,

Whereas you hold or occupy a certain messuage or tenement and premises, with the appurtenances, called or known by the name or sign of the ——, situate, &c. under and by virtue of a memorandum of agreement, dated, &c., and whereby you agreed to quit and deliver up the said premises at any time thereafter, upon three months' notice for that purpose being given or left for you at the said premises, without any reference to the time of entry, and also to assign and deliver up to such person as your then landlords, *A. B.*, *C. D.*, and *E. F.*, therein mentioned, should appoint, *upon demand* for that purpose (or otherwise upon your quitting the said premises,) all and every the licenses for carrying on the trade of a victualler on the same premises, *upon being paid*, or offered to be paid, for the time then to come therein respectively; and whereas the said *A. B.* is now deceased, and the subscribed parties are now entitled to and interested in the said premises; *now therefore*, we whose names are hereunto subscribed do hereby jointly and severally, according to our respective estates and interests of and in the said messuage or tenements and premises, hereby give you notice, and require you, in pursuance of your said agreement, to quit and deliver up the said premises to us, and each and every of us, and especially to the said *I. K.* (to whom the said premises have been duly demised for a long term of years, now subsisting, and whom we hereby appoint to receive possession of the said premises,) *upon the 29th day of September now* next ensuing, being upwards of three months from the time of your being served herewith, *or in case, from any unforeseen circumstance, we are not authorized to require you to quit the said premises on that day, then we hereby give you notice and require you to quit the same at the earliest time that we or any or either of us can or may by law require you to quit the same*; and we hereby further give you notice that the said *I. K.* will, at the time aforesaid, pay to you for the time to come in all and every the licenses for carrying on the trade of a victualler on the said premises, and that *we hereby* demand and require you, at the time aforesaid, to assign and deliver to the said *I. K.* all and every the said licenses for carrying on the trade of a victualler on the said premises. In witness whereof we have hereunto subscribed our respective hands this —— day of ——, A. D. 1833.

Witness to the signatures of the said } (Signatures here in due order.)

Witness to the signature of the said }

Notice by a landlord to determine a lease at the end of the first seven years.

Sir,

Whereas by a certain indenture of lease, bearing date the —— day of ——, which was in the year of our Lord ——, and made or mentioned to be made between me, *A. B.* of ——, of the one part, and you, *C. D.* of ——, of the other part, I, the said *A. B.*, for the considerations therein mentioned, did demise and lease to you the said *C. D.*, your executors, administrators, and assigns, a certain messuage, tenement and premises, to hold the same to you the said *C. D.*, your executors, administrators, and assigns, from thenceforth for and during and unto the full end and term of —— years from thence next ensuing, and determinable, nevertheless, as therein and hereinafter is mentioned, and in which said indenture of lease is contained a *proviso* or condition that if, &c. (*reciting the proviso*); now I, the said *A. B.*, in pursuance of the power given me by the aforesaid *proviso* or condition, do hereby give you notice, that it is my mind and intention to avoid, and I hereby give notice that I do hereby avoid, the said recited indenture of lease, at the end of the first seven years of the said term of —— years thereby granted. Dated, &c. Your's, &c. *A. B.*

To Mr. *C. D.*

(o) *Ante*, 472, n. (*d*).

(p) *Sapsford* v. *Fletcher*, 4 Term Rep. 511; *Exall* v. *Partridge*, 8 T. R. 308; *Moore* v. *Pyrke*, 11 East, 52; *Burnett* v. *Lynch*, 5 Bar. & Cres. 589, 789.

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nevertheless insure a sum sufficient to form a fund out of which to pay the rent, which even in equity he will continue liable to pay, although the lessor neglect to rebuild.(r) We have also suggested the covenants and qualifications it is expedient for the tenant to require in the lease. If his landlord be vexatiously disposed to distrain the instant rent has become due, the law allows him a particular protection, that of producing the amount of rent in cash (not exceeding 40*s.* in silver) on the day the rent is payable, just before sunset, in the presence of one or more witnesses, and declaring to them that he is ready to pay so much for rent then due, and they should count the money; and this, although neither the landlord nor any one on his behalf be present, and though in general a tender must be to the creditor in person, will be a *sufficient tender*, and be a bar to any distress or action, unless subsequently the landlord demand the amount, and the tenant then neglect or refuse to pay. In all other respects the tenant must at all times strictly observe the covenants, or, unless it be expressly otherwise provided, he may be incessantly harassed with vexatious actions for trifling breaches. He must also observe the directions of the Game Act, and unless he have express permission, must not sport or allow others to do so.(s) The *precautionary measures* to be observed by a tenant, in case he should be threatened with proceedings to recover the estate by an adverse claimant, will be considered in the next chapter.(t)

5. Precautionary measures relating to Carriers.

5. Another precautionary measure is that by *Carriers*, who, it has been long held, may, by giving a *proper notice*, *qualify* their contract, and limit or entirely get rid of their general liability for losses unless paid a reasonable compensation for trouble and risk.(a) Since the late act, 11 Geo. 4 and 1 Will. 4. c. 68, the liability of carriers is however regulated by that act, though we will shortly notice the *previous decisions*. It was held that a carrier's notice will not protect him from ***his own individual misfeazance, gross negligence***, or ***contravention*** of an act of parliament, as of the porterage act,(b) and by a

(r) *Leeds* v. *Cheetham*, 1 Simons, 146.

(s) 1 & 2 W. 4, c. 32, sect. 12.

(t) 3 Bar. & Adolp. 408, 409, as to *Notice of Proceedings*.

(a) Carriers were allowed by law power to limit or entirely determine; *Clay* v. *Willan*, 1 H. Bla. 298; *Izell* v. *Mountain*, 4 East, 374; *Nicholson* v. *Willan*, 5 East, 507; *Wynne* v. *Raikes*, 2 Smith, 102; *Richardson* v. *Sewell*, Id. 205; *Clarke* v. *Gray*, Id. 623; *Maving* v. *Todd*, 1 Stark. R. 72; 4 Campb. 225, S. C.

(b) See instances of such *misfeazance* or *gross negligence*, *Birkett* v. *Willan*, 2 Bar. & Ald. 356; *Duff and others* v. *Budd*, 6 Moore, 469; *Rowe* v. *Young*, 2 Bro. & Bing. 177; *Batson* v. *Donovan*, 4 B. & Ald. 21; *Garnett* v. *Willan*, 5 Bar. & Ald. 53; *Sleat* v. *Fagg*, Id. 342; *Wright* v. *Snell*, Id. 350; *Boddenham* v. *Bennett*, 4 Price, 31; *Lowe* v. *Booth*, 13 Price, 329; *Smith* v. *Horne*, 2 J. B. Moore, 18; 8 Taunt 144, S. C.

clause in the recent act the same rule is enforced and extended to loss by felonious acts of the carrier's servants.(c)

Where a carrier gave notice by printed proposals that he would not be answerable for certain valuable goods, if lost, "of *more than the value of a specified sum*, unless entered and paid for as such," and goods of that description were delivered to him by *A.*, who knew the conditions but concealed the value, and paid no more than the ordinary price of carriage and booking; it was held that the carrier was neither liable to the extent of the sum specified, nor to repay the price actually paid for the carriage or booking. (*d*)

It was held that the *notice* must be *expressly or impliedly* communicated to every individual to be affected by it; but when a notice is given under the recent act, it is expressly provided, that all persons shall be affected by the same, without proof of actual knowledge. (*e*) One usual mode was, to stick up boards with the notice printed upon them, in large characters, at the coach offices and warehouses, or places where the goods were received for carriage, and at each *termini* of the journey. But it was held that this alone would not suffice, without proof that the party sending or to receive the goods, or his agent, had actually read such notice, or that it has been pointed out or its terms stated to him. The notice must have been brought home to such party, or the carrier would continue liable, as if no notice had been given. (*f*) However, the notice to a vendor or a principal was considered equivalent to a notice to the vendee or agent, and *vice versâ*. (*g*) It was not sufficient to show that a notice was exhibited in the carrier's office, where

(*c*) 11 Geo. 4 and 1 W. 4, c. 68, s. 8, *post*, 488, 489, in notes.

Form of carrier's notice before the stat. 11 Geo. 4 and 1 Wm. 4, c. 68.

(*d*) *Clay* v. *Willan and others*, 1 H Bla. [illegible]. The notice was thus: "Willan and Co. humbly beg leave to inform their friends and the public that cash, plate, jewels, writings, or any such kindof valuable articles, they *will not be accountable for if lost of more than 5l. value, unless entered as such, and a penny insurance paid for each pound value*, when delivered to the book-keeper or other person in trust to be conveyed by any carriage that runs at the above [illegible]n."

The same rule was established in *Nicholson* v. *Willan*, 5 East's R. 507, where the notice was as follows:

Another form of carrier's notice.

"Take notice, that the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, plate, jewels, watches, writings, goods, *or any package whatever* (if lost or damaged), above the value of 5*l.*, unless insured and paid for at the time of delivery, and demanded in one month after such damage was sustained." See also a similar decision on a carrier's notice of this description, *Tyell* v. *Mountain*, 4 East's R. 370; and see a *wharfinger's* notice that he would not be responsible for loss by fire, *Maving* v. *Todd*, 4 Campb. 225; 1 Stark. R. 72, S. C.; but which seemed unnecessary, as *wharfingers* and carriers are not in general liable for loss occasioned by accidental fire after they have arrived, and are in their possession rather as *warehousemen* than carriers; *Garside* v. *The Trent Navigation*, 4 Term R. 581.

(*e*) 11 Geo. 4 and 1 Wm. 4, c. 68, s. 2. *post*, 489, in notes.

(*f*) *Davis* v. *Willan*, 2 Stark. R. 279; *Mayhew* v. *Eames*, 3 B. & Cres. 601.

(*g*) *Maving* v. *Todd*, 1 Stark. R. 7; 4 Campb. 225, S. C.

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the goods were delivered by a porter, although the porter could read and had seen the notice, if in fact he never did read it; for the carrier should have requested the porter to read it, or state the contents or purport to him. (*h*) The notice must always have been large and easily legible, especially in the important parts. (*i*) Still less would notices given at the *termini* of a journey be sufficient, when the goods were delivered at an intermediate place. (*k*) It was held that notices in the *Gazette* might be read in evidence on the behalf of a carrier, but that they were very weak and inadequate notices, unless it were shown that the consignor or consignee was in the constant habit of reading the same. (*l*) With respect to notice in a newspaper, that was considered no evidence of notice, unless it were shown that the party was in the habit of reading that paper; (*m*) and even proof that he had for three years taken in a newspaper in which once a week the notice was advertised, would not always satisfy a jury that the party was aware of the notice, because, as was observed, few people read all the advertisements in a newspaper. (*n*) And it was held, that evidence of the general notoriety of the fact of notice having been given, and still less that all carriers usually had given notice, would not be sufficient where there was no other reasonable ground upon which to infer that a particular party had seen or heard of the particular notice. (*o*) And if a carrier had given two notices, limiting his responsibility, but varying in their terms, he was bound by that which was the least beneficial to himself. (*p*)

The present mode of limiting a carrier's liability under 11 G. 4 and 1 W. 4, c. 68. (*q*)

But now the law regulating and limiting the common law liability of carriers, is fixed by the recent act 11 Geo. 4 and 1 Wm. 4, c. 68, which protects carriers from liability in case of the loss of certain specified articles, exceeding the value of *ten pounds*, (excepting loss by the felony of the carrier's servants, or his own personal default,) *unless the party delivering the*

(*h*) *Jones* v. *Williams*, 2 Stark. [illegible]; *Davis* v. *Willan*, Id. 279.

(*i*) *Clayton* v. *Hunt*, 3 Campb. 27; *Butler* v. *Hearne*, 2 Campb. 415.

(*k*) *Gouger* v. *Jolly*, Holt's C. N. P. 317.

(*l*) *Leeson* v. *Holt*, 1 Stark. R. 186; *Jenkins* v. *Blizard*, Id. 418; *Milner* v. *Baker*, 2 Stark. 255; *Rowley* v. *Horne*, 3 Bing. 3.

(*m*) Id. ibid.

(*n*) *Rowley* v. *Horne*, 3 Bing. 2.

(*o*) *Semble*, *Gorham* v. *Thompson*, Peake's Rep. 42.

(*p*) *Munn* v. *Baker*, 2 Stark. R. 255.

(*q*) The statute 11 Geo. 4 and 1 Wm. 4, c. 68, s. 1, enacts, " that no mail contractor, stage coach proprietor, or other common carrier by land, for hire, shall be liable for the loss of or injury to any article of property of the *descriptions following*; that is to say, gold or silver coin, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, English, Scotch or Irish bank bills or notes, or of any other bank; orders, notes or securities for payment of money; English or foreign stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials; furs or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the per-

goods declare the value and offer to pay, if required, an extra charge for carriage, but requires that the notice of the in-

son of any passenger in any mail or stage coach, or other public conveyance, *when the value of such article or articles, or* property aforesaid, contained in such parcel or package, *shall exceed the sum of ten pounds, unless at the time of delivery thereof* at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her or their book-keeper, coachman or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, *the value and nature of such article or articles, or property,* shall have been *declared* by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sect. 2 enacts, that when any parcel containing any of the said articles shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be *lawful* for such mail contractors, stage coach proprietors, and other common carriers, to demand and receive an increased rate of charge, *to be notified by some notice affixed, in legible characters, in some public and conspicuous part of the office,* warehouse or other receiving house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid, at such office, shall be *bound by such notice,* without further proof of the same having come to their knowledge.

Sect. 3 enacts, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the persons receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, *sign a receipt* for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Sect. 4 enacts, that *no public notice or declaration heretofore made or hereafter to be made,* shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid, shall, from and after 1st Sept. A.D. 1831, be liable as at the common law, to answer for the loss of any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

Sect. 5 enacts, that for the purposes of this act, every office, warehouse or receiving house, which shall be used or appointed by any mail contractor or stage coach proprietor, or other *such common carrier* as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse or office of such mail contractor, stage coach proprietor or other common carrier, and that *any one or more of such mail contractors, stage coach proprietors or common carrier,* shall be liable to be sued by his, her or their name or names only; and that *no action* or suit commenced to recover damages for loss or injury to any parcel, package or person, *shall abate* for the want of joining any coproprietor or copartner in such mail, stage coach, or other public conveyance by land, for hire as aforesaid.

Sect. 6 provides, that nothing in this act contained shall extend or be construed to annul, or in anywise affect any *special contract* between such mail contractor, stage coach proprietor or common carrier, and any other parties, for the conveyance of goods and merchandizes.

Sect. 7 provides, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage, shall also be entitled to recover back *such increased charges* so paid as aforesaid, in addition to the value of such parcel or package.

Sect. 8 provides, that nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor or other common carrier for hire, from liability to

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creased charges that may be required shall be affixed in the office, and of which, when so affixed, every person is bound to take notice, but it provides that the act shall not affect *special contracts*. It then declares that all *other notices* then already or thereafter to be given shall not protect a carrier from liability, excepting when so given under the terms of the act, viz. when certain specified articles exceed the value of 10*l.* and when such notice has been duly affixed; but as to any *other* goods, or even the specified articles, when *under* the value of 10*l.*, *carriers cannot by any notice protect themselves from the ancient common law liability*. The act however allows effect to any *express special contract* made with a carrier, and according to the terms of that contract. The statute then authorizes an action for loss against any one proprietor, and excludes a plea in abatement of nonjoinder, and provides that if loss ensue, then not only the declared value, but also the money paid for extra insurance shall be recoverable; but entitles the carrier to require proof of the value of the package lost, and authorizes him to pay money into Court.

Since this act, carriers requiring an increased charge usually affix in their offices and circulate cards giving notice as in the forms in the notes. (*s*) It is settled by prior decisions that no

answer for the loss or injury to any goods or articles whatsoever, arising from the *felonious acts* of any coachman, guard, book-keeper, porter or other servant, in his or their employ, nor to protect any such coachman, guard, book-keeper or other servant, from liability from any loss or injury occasioned by his or their *own personal neglect* or misconduct.

Sect. 9 provides and enacts, that such mail contractors, stage coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the party suing, in respect of any loss or injury, *proof of the actual value* of the contents by the ordinary legal evidence, and that the mail contractors, stage coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges, as before mentioned.

Sect. 10 enacts, that in all actions to be brought against any such mail contractor, stage coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants *to pay money into Court*, in the same manner and with the same effect as money may be paid into Court in any other action.

Sect. 11 declares the act to be public.

Form of public notice at a waggon office, stating what extra charges are required when certain articles sent are of more than 10*l.* value.

(*s*) In pursuance of an Act of Parliament passed in the first year of the reign of William the Fourth, cap. 68, intituled, "An Act for the more effectual protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof,"

Notice is hereby given, That for any package to be conveyed for hire, or to accompany the person of any passenger, containing gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Bank of England, Scotland, and Ireland, respectively, or of any other bank in Great Britain or Ireland; orders, notes, or securities for payment of money, English or Foreign; stamps, maps, writings, title-deeds, paintings, engravings, pictures; gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured

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action can be supported against the postmaster-general for the loss of bills or bank-notes stolen out of letters put into the post-office; (t) and therefore it is a proper precaution to remit such documents in halves by different conveyances. (u)

6. Stipulations respecting liens and powers of sale.

6. Carriers have not a *general lien* for the carriage of successive packages, unless they expressly so stipulate, and communicate the same to each customer, and he acquiesce; consequently

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state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, *to a greater amount in value than Ten Pounds, the increased charge over and above the common and ordinary charge for carriage is as follows:—*

For any distance not exceeding	For each Pound Sterling in value,
50 miles	the sum of One Halfpenny.
75 miles	Three Farthings.
100 miles	One Penny.
150 miles	Three Halfpence.
200 miles	Seven Farthings.
250 miles	Two Pence.

Another form of waggon carrier's notice on a card.

NOTICE.—In pursuance of an Act of Parliament passed in the first year of the reign of his Majesty King William the Fourth, cap. 68, intituled, "An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for hire, against the loss of or injury to Parcels or Packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the Owners thereof,"—

Notice is hereby given, That for any package or luggage containing gold or silver coin of this realm, or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland, respectively, or of any other Bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or Foreign stamps, maps, writings, title-deeds, engravings, gold or silver plate, or plated articles, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, to a greater amount in value than Ten Pounds, the increased charge, over and above the common and ordinary charge for carriage, is after the rate of 12*s*. 6*d*. for every hundred pounds declared value: for any package, containing china, pictures, or paintings, an increased charge, after the rate of 1*l*. for every 100*l*. declared value: for any package, containing glass, an increased charge, after the rate of 15*l*. for every 100*l*. declared value: and the glass to be packed in the presence of the clerk, agent, or other servant of the carrier.

Notice is also hereby given, That any person or persons sending *aqua fortis, spirit of vitriol,* or any other *ardent spirits,* must write on the direction the contents, and make the same known to the book-keeper at the time of delivery; otherwise, if any damage shall arise therefrom, the proprietors of the waggons will look to the person sending the same for indemnification.—*All goods which shall be delivered for the purpose of being carried, will be considered as general liens, and subject not only to the money due for the carriage of such particular goods, but also to the general balance due from the respective owners to the proprietor of the waggons.*—Goods suffered to remain in either of his warehouses more than *forty-eight hours* after their arrival, will be at the sole risk of the respective owners thereof.—All goods directed to be left till called for, will be sold at the expiration of *One Year,* to defray the expenses chargeable thereon.—Claims for damage must be made within *Three Days* after the delivery of the goods, or the proprietor will not be answerable for the same.—Loss by leakage of casks will not be accounted for.—The proprietor will not be accountable for damage sustained by carriages of any description, nor will he undertake the conveyance of any horse or other animal; and should any horse or other animal be entrusted to the drivers of his waggons, it must be at the risk of the persons entrusting it.

[N. B.—The other side of the card related to the carriage of other goods without extra charge.]

(t) *Lane* v. *Cotton*, 1 Salk. 17; *Whitfield* v. *Lord Le Despencer*, Cowp. 754.

(u) See the consequences of loss, and of different parties being in possession of the halves, Chitty on Bills, 8 ed. 403, 406.

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it is advisable not only to advertise a public notice stipulating for such a lien, but also to make an express and particular contract to secure such lien.(*x*) So in any other case, where the established law or usage of trade will not clearly give a *general lien*, it is advisable not only to give *a public notice* in print or writing "that the goods of all persons dealing with the party in his trade, and whether belonging to the customer *or to any other person or persons*, (*y*) or *in which he is in any respect interested*, whether for a lien or otherwise, or which may be in the possession of the advertiser, or whether going to or from his manufactory or premises, must be understood to be and will be subject to a general lien for all monies due to the advertiser, as well from the customer as from any person or persons entitled to or interested in such goods." (*z*) It has been held that any person afterwards dealing with a party who has given such public notice, and having knowledge of the same, must be taken to have assented to the terms and *impliedly* to have entered into an agreement to the same effect. (*a*) But the most prudent course is for a trader always to have evidence of an express contract with each customer to the above effect. In general a lien cannot be *sold* (*except perhaps in cases of an advance of money on the deposit of perishable commodities* (*b*)). Therefore carriers and all persons entitled to a general or even a particular lien, should *expressly stipulate* for a power to sell the same, and prescribe the terms of sale, in case the lien be not satisfied. (*c*) For without such express power the party

(*x*) *Wright* v. *Snell*, 5 Bar. & Ald. 350; *Rushford* v. *Hadfield*, 16 East, 519; 2 Smith, 634; 7 East, 224; 3 Smith, 221. See id. the form of a carrier's notice to subject goods to a general lien; and see a form in *Kirkman* v. *Shawcross*, 6 T. R. 14, which may be readily applied.

(*y*) It was held that because the notice did not extend to "*goods to whomsoever belonging*," the lien did not extend to affect goods addressed to a person as *factor*, which evinces the expediency of introducing words to that effect, *Wright* v. *Snell*, 5 B. & Ald. 350.

(*z*) See a form, *infra*, note (*c*), and in *Kirkman* v. *Shawcross*, 6 T. R. 14; and see *Wright* v. *Snell*, 5 Bar. & Ald. 350, as to the proper contents of such a notice.

(*a*) *Kirkman* v. *Shawcross*, 6 T. R. 14.

(*b*) *Pothonier* v. *Dawson*, Holt's C.N.P. 383. The local customs of London and Exeter authorizing an innkeeper to sell a horse for his keep constitute an exception to this rule, *Jones* v. *Thurlow*, 8 Mod. 172; Bac. Ab. Inns, and Burn's J. Alehouses, XVII. But that custom only prevails in those places, and not elsewhere, Id. ibid.; *Jones* v. *Pearle*, 1 Stra. 557. It is submitted that a *general power of selling liens* under prescribed rules, or by permission of some constituted authority, ought to be enacted.

Suggested form of agreement stipulating for a *lien* and for a power of sale.

(*c*) Memorandum.—That it is this day agreed between *A. B.* of, &c. and *C. D.* of, &c. that certain goods [*naming or describing them*] deposited by the said *C. D.* with *A. B.* as a security for the repayment of £—— and interest on, &c. shall be held by the said *A. B.* as a lien and security for such repayment; and that unless the said money and interest be repaid by the said *C. D.* on that day, the said *A. B.* may, after ten days' notice in writing of his intention so to do, sell the said goods or any part thereof, either by public auction or private sale, for the best price that may be bid for the same, either in one or several lots; and thereout pay and satisfy the said money and interest, and all charges for warehouse-room, insurance, and other reasonable ex-

holding the lien has no right, either at law or in equity, to sell the commodity, (d) though we hear every day of public notices of such sales. If the commodity be of considerable value, especially if it be of a perishable nature, and the debt be also considerable, then if express authority for a sale has not been nor can be obtained, it may be expedient, even at the risk of an action of trover, after notice of the intention to do so, to sell; and in case the party be sued for that conversion, then to bring a cross action, and move to set off one judgment against the other; but still the party so proceeding will have to pay the costs of the action against him. (e)

Precautionary proceedings in other cases of contract.

In cases of express or implied *contracts* it frequently occurs that, in order to *perfect* the right, it is incumbent on the party who claims the benefit of the contract to secure legal evidence of his having taken certain *preliminary steps.*

7. The mode of performing a condition precedent.

7. Whenever a complete right to claim the payment of a sum of money or the delivery of goods, or the performance of some other act, which another engaged to pay, deliver, or perform, depends on the *previous* or *concurrent* performance of another act by the person in whose favour the contract was made, he must be prepared to prove his compliance or performance, or some excuse for his omission, before he can call on the other party to perform his engagement, or sue for the breach. The thing to be

penses; or the said *A. B.* may mortgage or deposit the said goods or any part thereof to or with any person or persons whatever, in order to obtain a sum sufficient to repay the said money and interest and all reasonable charges and expenses; and in the meantime the said *C. D.* is to incur all risk of fire or loss, neither of which are to prejudice or suspend the said *A. B.*'s right to sue for or recover the said money and interest of the said, &c. Dated this —— day of ——, A.D. 1833. *A. B.*
C. D.

[N. B.—If the object of the agreement be of 20*l.* value, or upwards, and not relating to the sale of goods, it must be stamped with an agreement stamp.]

The like, for a general lien and power of sale.

Memorandum.—It is agreed between *A. B.* of, &c., calico printer, &c., and *C. D.* of, &c. that the said *A. B.* shall at all times hereafter have a general lien upon and right to all goods and property whatsoever that shall or may be in the possession of the said *A. B.*, or be coming to or going from him or his premises, for or on the account of the said *C. D.*, when such goods shall belong or shall have belonged to the said *C. D.* or to him or any other person or persons, or when he has or hath had any right, interest, authority, or claim to or lien upon or in relation to such goods or property; and that such *general lien* shall at all times constitute and be a security to the said *A. B.* and his representatives and assigns, and to any new partner or partners, for all monies that may be due or become due from the said *C. D.* to the said *A. B.* or to him and such other parties in any way respecting the trade or business of the said *A. B.* or the said *C. D.* or on any other account whatever; and that if at any time the sum of £——, or upwards, shall be due or growing due from the said *C. D.* to the said *A. B.* it shall and may be lawful for the said *A. B.* after —— days' notice, &c. [*power to sell, as in the last form.*]

(d) *Ante*, 492, note (*b*).

(e) But this proceeding will require particular consideration in each case before a party holding a lien should thus expose himself to an action.

first done is termed in law a *condition precedent*, and which are as various as contracts themselves, and always are *substantially* governed by the bargain and intention between the parties, though there are certain technical rules which *assist* in their construction. (*f*) Good sense and a little consideration of what properly in each transaction *ought* to be *first* done by each party in any case, according to the *intention* of the parties, will enable almost any person, without any knowledge of technical rules of law, to decide what it is incumbent on him to do, and if he be wisely disposed to avoid litigation, he will do rather more than the strict law would require. It very generally occurs that the party ultimately to be the plaintiff in an action on the contract *must be prepared to show* that he has actually *performed* or observed the act to be first done or omitted by him, or at least done all that it was incumbent on him to execute *towards* the completion of that act, and that the other party has by his conduct *discharged* him from doing more, or *dispensed* with and *excused* any further performance. (*g*)

The familiar instances of the former are—if *B.* promise *A.* to pay him a sum of money, or to do any other act "*provided*" or "*on condition*" that *A.* first perform another act, *A.* cannot sue *B.* without averring and proving that he did or offered to do the act first to be performed. As if *B.* promise to deliver goods to *A.* for such a price, *A.* cannot sue *B.* for the nondelivery without showing that he *offered*, or at least was ready to pay, and that *B.* had *notice* of such readiness, and was *requested* by *A.* to deliver the goods, it being incumbent in such case on *A.* to show his readiness to pay, and to go to *B.* and demand the delivery, and not on *B.* to carry the goods and tender them to *A.* (*h*) So if the promise were to pay money in consideration that the plaintiff would execute a release, it must be shown that such a release was executed or acceptance of it refused; (*i*) *or rather that a draft was sent to the defendant for his approval or alteration, and that he refused to return it to be engrossed, or declared he would not receive it, or do what he engaged to perform.* (*k*) It has been supposed that where a vendor has delivered an abstract showing a proper title, and such title has been made out by proper deeds and documents, it is incumbent on the

(*f*) See the *older* rules and decisions collected in Comyn's Digest, tit. Pleader, and the *more modern* cases, 1 Chitty on Pleading, 361 to 365.

(*g*) *Jones* v. *Barclay*, 2 Dougl. 684.

(*h*) *Rawson* v. *Johnson*, 1 East, 203; *Buck* v. *Owen*, 5 T. R. 409.

(*i*) *Collins* v. *Gibbs*, 2 Burr. 899; *Smith* v. *Wilson*, 8 East, 437.

(*k*) *Jones* v. *Barclay*, Dougl. 684; *Philips* v. *Fielding*, 2 H. Bla. 125; *Smith* v. *Wilson*, 8 East, 443.

purchaser to tender a *conveyance* to the vendor; but this is not essential, and it would suffice to tender and deliver *a draft* of a proper conveyance to the vendor for his approbation previous to engrossment; and then, if he refuse to approve and return it for engrossment, it will be unnecessary to incur the expense of engrossment. (*l*)

It is essential, independently of litigation, well to consider what must be done by a party when his opponent refuses to complete the contract, and dispenses with the necessity for the intended plaintiff doing any more on his part; for in practice frequently much unnecessary and useless trouble and expense are incurred. Thus, if immediately after a person has agreed to purchase an estate, he should explicitly declare that he will not complete his contract, it will be quite unnecessary for the vendor even to send an abstract of his title, and still less to tender a formal conveyance executed, or ready to be, or even a draft executed by him. (*m*) But if the evidence of such positive declaration be doubtful, then an abstract should be delivered within a reasonable time; and then, in case it be returned, or if the draft of a conveyance be not sent by the purchaser to the vendor for his approbation, it will suffice for the vendor to serve a notice of his readiness to convey, and to appoint a named day for that purpose; and if such notice be not attended to, then the vendor has a perfect right of action or to file a bill for specific performance without executing any conveyance. So where a vendor or party has to execute a deed as a condition precedent, it is not absolutely necessary to execute it, but it suffices to send a draft purporting that all proper persons will be parties, (*n*) and accompanied with a request for the other party to peruse and approve it by a named day: and if the latter neglect to return it, there will be no legal necessity for engrossing or executing a stamped copy, especially if the party declare he will not complete or pay. (*o*) But in all these cases, where the complainant stops short in the actual full performance of the condition precedent, he must be well assured that he can prove that the other party either *prevented* his performance or *rendered* it *unnecessary* by his neglect, or that, in

(*l*) Sugden's V. & P. 8th ed. 231.

(*m*) *Seward* v. *Willock*, 5 East, 198; *Lowndes* v. *Bray*, Sittings after T. T. 1810, 1 Esp. R. 189; *Duke of St. Alban's* v. *Shore*, 1 H. Bla. 270; Sugd. V. & P. 8 ed. 233.

(*n*) When it is essential to show, in an action for not accepting a lease, that all persons having any interest were parties in the lease or deed tendered, see *Rumball* v. *Wright*, 1 Car. & P. 589.

(*o*) *Jones* v. *Barclay*, Dougl. 684, 688; 1 Saund. 320, note 4; *Smith* v. *Wilson*, 8 East, 443.

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the language of the law, he *discharged* the plaintiff from performance on his part of the condition precedent. (*p*)

8. When a *notice* is requisite or expedient in cases of *contract*.

8. With respect to the necessity for giving a *Notice* or making a *request*, the rules of law are most evidently founded on good sense and so as to accord with the intention of the parties. The giving notice in certain cases obviously is in the nature of a condition precedent to the right to call on the other party for the performance of his engagement, whether his contract were express or implied. Thus in the familiar instance of bills of exchange and promissory notes, the implied contract of an indorser is, that he will pay the bill or note provided it be not paid on presentment at maturity by the acceptor or maker, (being the party *primarily* liable,) and provided that he (the indorser) has due *notice* of the dishonour, and without which he is discharged from all liability; consequently, it is essential for the holder to be prepared to prove affirmatively that *such notice was given*, (*q*) or some facts dispensing with such notice. (*r*). Whenever the defendant's liability to perform an act depends on another occurrence which is *best known* to the *plaintiff*, and of which the defendant is not legally bound to take notice, the plaintiff must prove that due notice was in fact given. (*s*) So in cases of insurances on ships, a *notice of abandonment* is frequently necessary to enable the assured plaintiff to proceed as for a total loss when something remains to be saved, in relation to which, upon notice, the insurers might themselves take their own measures. To avoid doubt or ambiguity in the terms of the notice, it may be advisable to give it *in writing*, (*q*) and to preserve evidence of its delivery, as in the case of notices

(*p*) *Hotham* v. *E. I. Company*, 1 T. R. 638; *Jones* v. *Barclay*, Dougl. 684, 687, 688; Co. Lit. 206 (*b*); *Bowes* v. *Howe*, 5 Taunt. 30; *Ferry* v. *Williams*, 8 Taunt. 70; *Smith* v. *Wilson*, 8 East, 443.

Notice that corn bought is ready for delivery, and request to take away the same, or that it will be resold.*

(*q*) Sir, *Chingford, Essex.*
Whereas on the —— day of ——, A. D. —— last, you agreed with me to purchase and to fetch away from my farm, situate at ——, twenty quarters of certain wheat, as soon as the same should have been threshed and dressed and ready for delivery, and to pay for the same £—— per quarter; now I hereby give you *notice* that the said quantity of wheat has been threshed and dressed, and hath been and is ready for delivery to you pursuant to such bargain, and I hereby *request* you on or before the —— day of —— instant, to send for and fetch away the said quantity of wheat, and to pay for the same, or I shall immediately afterwards re-sell the same and commence an action against you to recover the loss, if any, upon such re-sale, and all expenses and damages for your breach of contract. Dated this —— day of ——, A. D.
To Mr. *C. D.* at ——. Your's, &c. *A. B.*"

(*r*) *Rushton* v. *Aspinall*, Dougl. 679. (*s*) *Lundie* v. *Robertson*, 7 East, 231.

* *Langfort* v. *Administrators of Tiler*, 1 Salk. 113; but see *Greaves* v. *Ashlin*, 3 Campb. 426.

of the dishonour of a bill. The form of the notice may be as subscribed, but it must necessarily vary in its terms according to the circumstances of each case. (t) So, in order to entitle a party to insist upon a strict and exact performance of a contract on the fixed day for completing it, and *a fortiori* to retain a deposit as forfeited, a reasonable notice must be given of the intention to insist on precise performance, or he will be considered as having waived such strict right. (u) So if a lessee or a purchaser be sued for the recovery of the estate, and he have a remedy over against a third person, upon a covenant for quiet enjoyment, it is expedient (although not absolutely necessary) to give the latter notice of the proceeding, referring to such covenant; but that proceeding will be more properly considered in the next chapter. (x)

9. When a request or demand is necessary or advisable in case of contracts.

9. So with respect to the necessity for a *Request*, it depends on the express or implied stipulation of the parties; thus if *B.* sell to *A.* a horse, to be paid for on delivery, *A.*, in an action for the non-delivery of the horse, must aver and prove a *previous request* to *B.* to deliver the same; (y) or it must be shown that *B.* has incapacitated himself from performing his contract, as that he has resold and delivered the horse to another person. (z) So on a general promise to marry, it is necessary to show a request to marry, or a dispensation by the parties marrying another person, or absolutely refusing to marry at any time. (a)

In general when a debt exists payable immediately, the law does not require any demand or request to pay it before the commencement of an action, (b) and it is the legal duty of the debtor to find out and pay his creditor; and this doctrine extends even to a negociable bill of exchange, though the acceptor may not know who is the holder, and, consequently, an action may be commenced against him without even tendering the bill for payment. (c) But when, by the express terms of the contract, a previous *demand* is necessary, it must be made; and at all events, unless the debtor be about to abscond, the

(t) See the form, *ante*, 496, note (q); *Rushton* v. *Aspinall*, Dougl. 679, 680; *Cutler* v. *Southern*, 1 Saund. 117; Com. Dig. Pleader, C. 73; 1 Chitty's Pleading, 360 to 362.

(u) *Carpenter* v. *Blandford*, 8 Bar. & Cres. 575.

(x) *Smith* v. *Compton*, 3 Bar. & Adolp. 407; and see 3 Term R. 374.

(y) *Back* v. *Owen*, 5 T. R. 409; *Rawson* v. *Johnson*, 1 East, 204.

(z) *Bowdell* v. *Parsons*, 10 East, 359; *Amory* v. *Brodrick*, 5 Bar. & Ald. 712.

(a) *Seymour* v. *Gartside*, 2 Dow. & Ry. 55; *ante*, 57, note (n), and 438, note (e).

(b) *Birks* v. *Trippett*, 1 Saund. 33; *Capp* v. *Lancaster*, Cro. Eliz. 548.

(c) Id. ib.; *Wegersloffe* v. *Keene*, 1 Stra. 222; Chitty on Bills, 8th edit. 391, 392; *sed quære*, see suggestions, id. ib.

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courts would censure the commencement of an action without previous request.

A *request*, like a notice, may as well be *in writing* and in the subscribed form, varying, however, necessarily according to the circumstances of each case. (*d*)

Demand or request to *account* or to pay, &c.

Before the commencement of an action at law or filing a bill in equity *for an account* against a partner, or a factor, or agent, it is expedient, if not necessary, to demand *an account;* such a previous demand is essential with regard to costs in equity. In general, upon a bill in equity praying nothing but a discovery, it has been held that the defendant is entitled to costs, and those as between attorney and client. (*e*) But Mr. Justice Buller thought the rule thus laid down was too general, and was of opinion that if the plaintiff is entitled to the prayed discovery, and goes *first* to the defendant to ask for the accounts he has in justice a right to, if the defendant refuse, and the plaintiff is thereby compelled to file a bill for a discovery, he ought not to have the costs thus vexatiously occasioned by his own obstinate resistance of just disclosure; but that if the plaintiff *first* files his bill without trying to get the discovery in that way in which men acting with each other *ought* first to ask their rights, he ought to pay costs. (*f*) In a case at law, the counsel complained of the hardship of the rule, that a plaintiff in equity should be obliged to pay the costs of a discovery, upon which Lord Kenyon observed that he had once

Suggested form of a *request* to execute a counterpart of a lease, &c.

1 *May*, 1833.

(*d*) Sir,—I beg to refer you to the agreement between us of the —— day of —— last, by which you agreed to accept from me a lease of the farm therein mentioned, upon certain terms therein specified. You will herewith receive the *draft* of a proper lease prepared by Mr. ——, my solicitor, in conformity, as I am advised, in all respects with the terms of the said agreement, and I request your immediate perusal and approbation, or if you should think that the terms of the draft ought to be altered in any respect, then I request you immediately to introduce such alterations in the draft, and if they should be proper or reasonable I will forthwith adopt the same or otherwise correspond further with you. But I positively require you to return the draft approved or altered on or before the —— day of ——, so that the same may be engrossed and the lease and counterpart executed on the —— day of —— next, or I shall be under the necessity of immediately commencing legal proceedings against you.

To Mr. &c. Your's, &c.

Form of demand of payment.

Dated, &c.

Sir,—My claim upon you for £—— upon, &c. (here state the nature of the claim generally,) has long been due and unsatisfied; and as there can be no well-founded objection to the claim, I request you to pay the amount to me on or before the —— day of ——, or without any further communication either from me or my attorney (the expense of whose letter would only increase the costs) legal proceedings will be issued on the day following. I am, Sir, your's, &c.

(*e*) *Simmonds* v. *Lord Kinnaird*, 4 Ves. jun. 716; *Cartright* v. *Hately*, 1 Ves. jun. 293; and see *ante*, 438, 439.

(*f*) *Weymouth* v. *Boyer*, 1 Ves. jun. 416; Lord Eldon approved that doctrine, 1 Madd. Ch. Pr. 217, note (*y*); and see *ante*, 438, 439.

heard Lord Mansfield say, he thought the court of law ought to allow the costs paid to the defendant in equity as costs at law; and that he was struck with the propriety of the observation, and thought it would be a good rule to be adopted. (*g*) If an agent do not render his accounts within a reasonable time after request, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him that he offered to pay a gross sum which it turns out would have covered all that was due from him. (*h*)

10. Notices of nonpayment of bills or notes.

10. As of great practical importance, it is advisable here more particularly to observe upon the necessity for a *notice* to *perfect* a right and prevent loss in case of the non-payment of a *bill of exchange or promissory note*. It is a general rule, that if the acceptor of a bill or maker of a note neglect on due presentment to pay it on the day it falls due, *a proper notice of such nonpayment* must, within a *reasonable* time, be given to or forwarded towards the drawer and indorsers of the bill and the indorsers of the note, and to *all parties* to those instruments, and even to the mere transferer of a check. (*i*) This time is now fixed by law. The notice *may* be given upon the day of refusal, especially after an express refusal; it *must* be given or forwarded *on the day after the dishonour* to all parties, or to such of them to whom it is intended to resort for payment, or at least to the last indorser, and each indorser in his turn must, *on the day after he receives notice*, give or forward to his immediate indorser notice of such dishonour. Each indorser, without regard to the number of them or the nearness of their residence, is, for the sake of certainty, allowed a day, or in other words *his* day, that is, until the day after that on which he received notice, to communicate or forward the intelligence to others. (*k*) If a party receive notice of the dishonour on one day, he must, if the next indorser reside in the *same* town, or in London within limits of the three-penny post, give the notice or put the letter containing it into the post soon enough on the day after, that it may be actually received and read *on that day*. (*l*) Where the next indorser does not reside in the same town, then the notice is to be sent by the general post, or if none, by a special messenger or next best conveyance, and it

(*g*) *Grant* v. *Jackson*, 1 Peake's R. 203; Mad. Ch. Pr. 217.
(*h*) *Collyer* v. *Dudley*, 1 Turn. & Russ. R. 421; *post*, 509, n. (*s*).
(*i*) *Smith* v. *Mullett*, 2 Campb. 208; *Scott* v. *Lifford*, 9 East, 347; *Williams* v. *Smith*, 2 Bar. & Ald. 496; *Geill* v. *Jeremy*, Mood. & M. 61; Chitty on Bills, 8th edit. 513 to 525.
(*k*) Id. ibid.
(*l*) *Dobree* v. *Eastwood*, 3 Car. & P. 250; *Smith* v. *Mullett*, 2 Camp. 208.

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suffices to put the letter giving it into the post-office *on the day after* the party so doing has himself had knowledge of the dishonour of the bill or note; and it is not necessary to forward notice on the *same* day as that on which he received notice, although there might be abundant time to have done so; (*m*) and if there be no post on the day after, then it suffices to put the letter into the post-office on the second day. (*n*)

If these rules be not strictly observed, the person guilty of the neglect will lose his remedy against the party, who would otherwise be liable to pay the bill or note, not only on the bill but for the debt or consideration on which it was founded. (*o*) unless he can excuse the neglect by the proof of some accident or particular circumstance not attributable to his own or his agent's neglect, or can show that the party to whom notice was not given in due time has no right to object to the want of it, because he had no effects and had given no value, and that the notice would have been of no utility to him; circumstances which sometimes occur, but which are mere accidents not to be calculated or relied upon by a prudent holder. (*p*)

Requisites in form of notice of nonpayment.

With respect to the *form* of the notice of nonpayment, though no technical words are prescribed, yet it must be explicit, and sufficiently apprize the party to whom the notice is addressed. 1st. To what particular bill or note it alludes, and how the latter was a party to it, whether as drawer or indorser, so that he may not mistake it for some other bill. 2dly. It must state or describe that the instrument has actually been presented for payment; and, 3dly, that it has been refused payment or dishonoured; and it would be as well if a copy of the bill be forwarded with a statement of the terms of the refusal to pay. It has been recently decided that a letter from the attorney of an indorsee to a drawee, dated the day the bill fell due, merely containing a demand of payment, without stating that the bill had been presented and refused payment, is not sufficient. (*q*) Nor is a notice, stating the bill to have been

(*m*) *Williams* v. *Smith*, 2 Bar. & Ald. 496; *Darbishire* v. *Parker*, 6 East, 3; *Bray* v. *Hadweere*, 5 Maule & Sel. 68.

(*n*) *Geill* v. *Jeremy*, Mood. & M. 61; Chitty on Bills, 8th edit. 518, note (*a*); and *Hawkes* v. *Saller*, 4 Bing. 715.

(*o*) See all the above cases, and *Bridges* v. *Berry*, 3 Taunt. 130; *Reid* v. *Coates*, 6 Brown's Parl. C. 264.

(*p*) Chitty on Bills, 8th edit. 468.

(*q*) *Hartley* v. *Case the younger*, 4 Bar. & C. 339; 6 Dowl. & R. 505; 1 Car. & P. 555, S. C. The plaintiff, in order to prove notice of the dishonour of the bill to the defendant, (*Case the younger*, and who was the drawer,) gave in evidence the following letter from the plaintiff, who was an indorsee, and dated the 16th August, 1824, *the very day on which the bill became due*: "I am desired to apply to you for the payment of the sum of 150*l.*, due to myself, on a draft drawn by Mr. Case on Mr. Case, which I hope you will, on receipt, discharge, to prevent the necessity of law proceedings, which otherwise will imme-

drawn by the party to whom the notice was sent, when in fact he was only an indorser, sufficient, as it mistated the fact.(r) So where the holder's attornies wrote to an indorser, "a bill for 683*l.* drawn by *K.* upon *J.* and bearing your indorsement, has been put into our hands by *A.* with directions to take legal measures for the recovery thereof, unless immediately paid to your's, &c." this was holden an insufficient notice of the dishonour, because it did not state expressly or by necessary implication that the bill had been dishonoured; and it is not sufficient merely to say that the holder looks to the indorser for

diately take place." Abbott, C. J. at the trial, was of opinion, that as this letter *did not apprise the party of the fact of dishonour, but contained a mere demand of payment, it was insufficient,* and the plaintiff was nonsuited; and a rule for a new trial having been granted, Abbott, C. J. on discharging the rule, said, "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice, it does not even say that the bill was ever accepted, we therefore think the notice was insufficient."

The following comprehensive form is suggested as expedient to be adopted upon the dishonour of an inland bill, and it may be readily altered and adapted to every particular case:—

Suggested form of notice.

No. 5, Cornhill, London,
Dated 5th July, A. D. 1831.

Sir, (*or* Gentlemen,)

I hereby give you notice that the bill of exchange dated 1st May, 1831, last past, drawn by *A. B.* of ——, in the county of ——, on *C. D.* of No. —, —— Street, London, and whereby the said *A. B.* requested the said *C. D.* two months after the date thereof, to pay to the said *A. B.* or his order, 50*l.*, and which was indorsed by the said *A. B.* to *E. F.* of, &c. and by the said *E. F.* to *G. H.* of, &c. and also by the said *G. H.* to you, and also by you, and whereof I am now the lawful holder, was on yesterday, the 4th day of July instant, duly presented to the said *C. D.* for payment thereof, but was and is unpaid and dishonoured, the said *C. D.* stating that, &c. [*according to the answer given to the notary*] and I request you immediately to pay the amount to me, to prevent the expense of litigation, which will otherwise be immediately incurred.

I am, Sir,
Yrs. Obly.
L. M.

To *I. K.* Merchant, or Messrs. *I. K.* & *Co.* [*according to the fact*]
at ——, in the county of ——.

Although it is certainly unnecessary, and not the practice, to frame the notice thus *formally*, it may be *expedient*, when time and circumstances will allow, to state the residence of the drawer and prior indorsers to the party to whom the notice is given, and who may have forgotten the same, so as to enable him immediately to forward the like notice to, and sue them. A duplicate of such letter should be kept, and it will be prudent, for fear of the death of one, that at least two competent witnesses should examine the original letter with the duplicate, and both be able to swear that such original letter was put in the proper post, duly directed, and within the proper time; and it will be advisable to avoid the necessity for numerous witnesses and complication of proof, which sometimes creates insurmountable difficulty, to let the very same two persons who saw the holder sign his name to the original and duplicate letter, put the same in the head or proper post-office, and not to employ any intervening person. See *Hetherington* v. *Kemp*, 4 Camp. 193, Chitty on Bills, tit. "Evidence."

(r) *Beauchamp* v. *Cash*, Dowl. & Ryl. Ca. Ni. Pri. 3. But in America, where a notice of dishonour calling the note Jotham *Cushing's* note, instead of Jotham Cush*man's*, and describing it as due 6th January, when it was due on the 3d January, the jury were directed to find for the plaintiff, unless they thought defendant was really misled. *Smith* v. *Whiting*, 12 Mass. Rep. 6. Bayl. 162, Amer. edit.

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payment.(s) But a letter from the holder to the payee, who was also the indorser of a note, in these terms;—"Mr. Ellis, (the maker) is unable to pay the note for a few days; he says, he shall be ready in a week, which will be in time for us," was held to be a sufficient notice. (t) And in America it has been considered that a trifling mistake in spelling a name or in stating a date is not material, and therefore where the notice of dishonour called the note, Jotham *Cushing's* note, instead of Jotham *Cushman's* note, and described it as due the 6th of January, when it was due on the 3d of January; the jury were directed to find for the plaintiff, unless they thought the defendant was really misled. (u)

In practice a very concise form of notice is given, and it might be inconvenient in mercantile affairs to require any unnecessary formal words. (x) But in cases of dishonoured bills or notes of any magnitude it would be advisable to adopt the fuller before referred to, (y) and to send and refer to a copy of the bill or note, and state, when well known to the writer, the residences of the drawer and indorsers, so as to enable the party to receive the notice, immediately to forward the like notice to such parties and sue them. Great care must

(s) *Solarte* v. *Palmer*, 7 Bing. 530; 5 Moore & P. 475; 9 Law Journal, 121; 5 Car. & P. 475, S. C.

(t) *Margeson* v. *Goble*, 2 Chit. Rep. 364.

(u) *Smith* v. *Whiting*, 12 Mass. Rep.; 6 Bayl. on Bill, 162, Amer. ed.

A short form of notice of non-payment of a bill or note.

(x) No. ——, Milk Street, Cheapside, 2d May, 1833.

Sir,

The Bill on *A. B.* for 50*l.*, indorsed by you and which fell due yesterday, and whereof I am the holder, was yesterday duly presented for payment to the said *A. B.* and dishonoured by him, and lies in my hands unpaid. I request your immediate payment of the amount to avoid further expenses. Yours obediently,

To Mr. *E. F.* *G. H.*

No. ——, Fenchurch Street, London.

Suggested full form of notice of non-payment of a bill or note.

(y) First copy at the top the bill or note, with the indorsements, then proceed as follows:—

Sir, (or Gentlemen,) 5th January, 1833.

I hereby give you notice that the bill of exchange (a copy of which is superscribed) dated 1 Nov. 1832, last past, drawn by *A. B.* of, &c. [place of date of bill] on *C. D.* of No. ——, Street, London, and whereby the said *A. B.* requested the said *C. D.* two months after the date thereof, to pay to the said *A. B.*, or his order, 50*l.* and which was indorsed by the said *A. B.* to *E F.* of, &c., and by the said *E. F.* to *G. H.* of, &c., and also by the said *G. H.* to you, and also indorsed by you, and whereof I am now the lawful holder, was on yesterday, the 4th day of January inst., duly presented to the said *C. D.* for payment thereof, but was and is unpaid and dishonoured, the said *C. D.* stating that, &c. [according to the answer given to the notary] and I request you instantly to pay the amount to me to prevent the expense of litigation, which will otherwise immediately be incurred. I am, Sir,

Yours obediently,

L. M.

To *I. K.*, Merchant, or Messrs *I. K.* & *Co.* (according to the fact) at No. —, Street, Cheapside, London, or at ——, near ——, in the county of - ——.

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be observed correctly and fully to *address the letter* containing the notice to the proper intended party, for any mistake occasioning delay, and which might have been avoided by due care, will deprive the holder of all remedy against the party to whom the notice ought to have been given; and all the prior parties to whom he might in his turn have given notice unless the latter have direct notice from the holder.(z) If the party reside in a city or large town the direction should not be to him at that place generally, but state the particular street or part of the town where he resides, and his trade or occupation, so as to prevent the risk of misdelivery, which might at least occasion delay in the proper person receiving such notice; therefore it has been held that a notice to an *indorser* thus, "Mr. Haynes, Bristol," is too general and insufficient, without express evidence that the proper party received it in due time, because the place being so populous there may be many persons of the same name there.(*a*) And though a distinction has been taken as to a *drawer*, who himself dated his bill so generally as "Manchester," it was considered that a notice directed to him equally general sufficed; (*b*) every prudent holder should in all cases make active inquiries, and write the fullest description on a letter giving notice.(*c*) It has been suggested, that if it be proved that there was a directory for the place, where it is supposed the drawer or indorser resides, then that the adoption of the address, given in such directory, might perhaps be held sufficient.(*d*) It is not usual to advertise the dishonour of a bill or note in the public papers, but where the sum is considerable, and all other inquiries after the indorser have failed, it might be expedient to adopt that means of giving notice.

A duplicate of the letter containing the notice, and of the address or direction, should be made and examined with the original by the person or persons who will deliver or put the original in the post, and who must be and continue a competent witness to prove such facts; and it will be prudent, for fear of the death or absence of one, that at least two competent witnesses should adopt this precaution; and it will be expedient for each to mark on the duplicate the exact time the original was delivered or put in the post, for a doubt as to the time, as the witnesses swearing it was either the 1st or 2d day in the month, would be fatal; (*e*) and it would be advisable, to avoid

(z) *Esdaile* v. *Sowerby*, 11 East, 117.
(*a*) *Walter* v. *Haynes*, Ry. & Moody, 149.
(*b*) *Mann* v. *Ross*, Ry. & Moody, 249.
(*c*) Bayl. 5th ed. 230.
(*d*) Id. 231.
(*e*) *Lawson* v. *Sherwood*, 1 Stark. R. 314.

the necessity for afterwards calling numerous witnesses, and complication in proof of every link in the chain of evidence, to let the very same two persons who saw the holder sign his name to the original and to the duplicate letter or notice, deliver the same or put the same into the head or proper post-office, and not to employ, as is generally the case, any intervening person;(*f*) for if several persons intervene, all must be called as witnesses in case of the trial of an action, and if any one be omitted the proof will be insufficient.(*g*)

If a *verbal* notice only is intended to be given or left, it must be in substance in the same terms as a written notice and afford the same information. It may be left at his counting-house or residence, or delivered to the party himself, or to any person at his counting-house or residence, and apparently there as a clerk or one of the family domiciled there;(*h*) and when during the usual hours of business, on the proper day, no person is found at the counting-house to receive the notice, it suffices to be prepared to prove that diligent inquiry *there* was made on that day for the purpose of giving notice, though ineffectual;(*i*) and where an ineffectual attempt to give notice has been made at the counting-house, it is not also necessary to attempt to give or leave a notice at the *residence* of the indorser.(*i*) However, the more prudent course, though not absolutely necessary, is to leave a written notice as well at the residence as at the count-

(*f*) *Hawkes* v. *Haller*, 4 Bing. 715; *Hagendon* v. *Reed*, 2 Campb. 479; *Hetherington* v. *Kemp*, 4 Campb. 193.

(*g*) *Toosey* v. *Williams*, Mood. & M. 129. In a case in December, 1827, G. H. K. B., Scarlett, Attorney-General, objected that the practice of a *private* office as to leaving letters in a box, was inadmissible, though according to a decision of Lord Ellenborough, when Garrow was Attorney-General, the practice of a *public* office is admissible. Scarlett objected that in a *private* office it should be otherwise, as the principal might purposely subtract the particular letter. Lord Tenterden said, "In this case there is a person intervenes between the copying clerk in the letter book and the person whose duty it is to take it to the post office. I therefore reject the evidence of the practice of the office."

Toosey v. *Williams*, Mood. & M. 129. Where the practice of the defendant's counting-house was, that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry:—Held, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff, could not be read as proof of such letter having been sent to the plaintiff. Lord Tenterden, C. J.:—"I have great reluctance to refuse this evidence, but am bound to do it. The practice here differs from that in most counting-houses. If the duty of the clerk had been to see the letters he copied carried to the post-office, it might have done; but here there is something else to be done afterwards, and that by the defendant. There is not enough shewn to render the letter admissible." Verdict for the plaintiff. *Hagendon* v. *Reed*, 3 Campb. 379. *Hetherington* v. *Kemp*, 4 Campb. 193.

(*h*) *Crosse* v. *Smith*, 1 Maule & Selwyn, 545.

(*i*) *Bancroft* v. *Hall*, Holt, C. N. P. 476; *Crosse* v. *Smith*, 1 Maule & S. 545; *Goldsmith* v. *Bland*, Bayl. 8th ed. 246; Chitty, 8th ed. 502, n. (*e*).

ing-house of every indorser,(*k*) so as to avoid the possibility of a defence that the parties have not in fact received in due time ample notice.

11. Of tender of indemnity.

11. Cases very frequently occur in which a party may in fact refuse to pay money or perform some other act on account of some actual or pretended risk he would thereby incur of being thereafter sued for the amount by some third person; in these cases it is sometimes necessary and always advisable to remove all pretence of objection by tendering *adequate indemnity*. With respect to lost bills, there is an express statute prescribing the nature of the indemnity in certain cases.(*l*) When a bill or note *continues lost* there is in general no remedy *at law*; but if adequate indemnity has been tendered and yet payment withheld, a court of equity will enforce payment, and subject the party to costs when the tendered indemnity has clearly been sufficient.(*m*) The same principle applies to other cases, and the offer of adequate indemnity will in general strongly incline a court and jury in favour of the party whose offer has been rejected. In these cases it suffices, first, to send a description of the proposed security and of the names and address of the proposed obligors; and if not expressly rejected then the draft of the proposed security should be sent for approbation, and if this be rejected or unattended to, it will not be necessary to tender either the proposed security already executed, or even engrossed, stamped, on parchment or paper.(*n*) We might here notice the right to retake goods obtained by false pretences, or under colour of a fraudulent purchase, or under colour of any other contract that has turned out to have been invalid, and the right to stop goods in *transitu* upon discovery of the insolvency of the purchaser before they have actually got into his possession. But precautionary measures of that nature it is apprehended will be more properly considered when we notice the preventive remedies by act of the parties after an injury has already been completed, or at least had inception, and which will be found in the seventh chapter.

(*k*) *Crosse* v. *Smith*, 1 Maule & S. 545; *Bancroft* v. *Hall*, Holt, C. N. P. 476.

(*l*) 9 & 10 Wm. 3, c. 17, s. 3.

(*m*) *Walmsley* v. *Child*, 1 Ves. sen. 338, and other cases, Chitty on Bills, 8th ed. 290.

(*n*) *Jones* v. *Barclay*, 2 Dougl. 684; *ante*, 494, 495.

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VI. Of precautions by an expected defendant.

VI. There are also many precautionary measures to be adopted on behalf of persons likely to become *defendants*, such as *tenders*, whether in cases of contract or in cases unconnected with contract, or in compensation for an *involuntary trespass*,(*o*) or by *Justices* and others under the general act,(*p*) or under particular acts allowing certain officers, as those of the *Customs*,(*q*) or *Excise*,(*r*) &c. to plead a tender or pay the amount of the supposed damages into court. So if a party likely to be sued in the Exchequer by bill for *an account* previously tender an adequate sum, he may then in some cases be excused the payment of costs.(*s*)

Tender how to be made.

In making a *Tender* in either of these cases errors frequently occur either in respect of the money not having been *sufficiently produced or offered* to be paid, or of some condition or qualification having improperly accompanied the offer, and

(*o*) 21 Jac. 1, c. 16, s. 5, enacts, "that in all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought; whereupon or upon some of them the plaintiff or plaintiffs shall be enforced to join issue; and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same. But this act only applies to trespasses to *land*, and not to trespasses to personal property. *Bailee* v. *Vivash*, 1 Stra. 549; nor to trespasses committed by a defendant *himself*, Id. ibid.; 3 Lev. 37; Vin. Ab. Trespass, S. a. 542; see the pleadings on this statute, *Williams* v. *Price*, 3 Bar. & Adol. 695.

(*p*) 24 Geo. 2, c. 44, s. 2, enacts, "that it shall and may be lawful to and for such justice of the peace, at any time within one calendar month after such notice given as aforesaid, *to tender amends* to the party complaining, or to his or her agent or attorney, and in case the same is not accepted, to *plead such tender* in bar to any action to be brought against him, grounded on such writ or process, together with the plea of not guilty, and any other plea with leave of the Court; and if upon issue joined thereon the jury shall find the amends so tendered to have been sufficient, then they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall become nonsuit, or shall discontinue his or her action, or in case judgment shall be given for such defendant or defendants upon demurrer, such justice shall be entitled to the like costs as he would have been entitled unto in case he had pleaded the general issue only; and if upon issue so joined the jury shall find that no amends were tendered or that the same were not sufficient, and also against the defendant or defendants on such other plea or pleas, then they shall give a verdict for the plaintiff and such damages as they shall think proper, which he or she shall recover, together with his or her costs of suit."

Sect. 4, enacts, "that in case such justice shall neglect to tender any amends, or shall have tendered insufficient amends before the action brought, it shall and may be lawful for him, by leave of the court where such action shall depend, at any time before issue joined, to pay into court such sum of money as he shall see fit, whereupon such proceedings, orders and judgments shall be had, made and given, in and by such court, as in other actions where the defendant is allowed to pay money into Court; and see Chit. Coll. Stat. 648, 649.

(*q*) 6 Geo. 4, c. 108, s. 95, 96, *Customs*.

(*r*) 28 Geo. 3, c. 37; 7 & 8 Geo. 4, c. 53, s. 116, 117, *Excise*; and see 6 Geo. 4, c. 114, s. 66, as to officers in *British possessions abroad*.

(*s*) 2 Madd. Ch. Pr. 556, 557; but see *ante*, 499, and *post*, 509, n. (*s*); *Pearse* v. *Green*, 1 Jac. & W. 135.

which the law considers to vitiate the tender. Properly the exact amount of what is admitted to be recoverable should be produced and counted in English gold and silver, (the latter not exceeding *forty shillings*,)(t) or in foreign coin made current by proclamation;(u) and the amount should be named to the party to whom the offer is to be made, and if possible the money laid down and counted in his presence;(x) though if he, after having been told that such a sum is about to be paid to him, declare he will not take it, because more is due, that dispenses with the actual production of the money;(y) but a mere dispute respecting the amount of the debt, without expressly dispensing with the production, will not excuse the omission, because if he had seen the money produced he might have been induced to accept it.(z) A tender of bank notes,(a) or even a provincial bank note,(b) is sufficient, unless objected to at the time on that account.(b) Properly the precise amount of pounds, guineas and fractions should be produced in gold, and shillings or sixpences, and not exceeding five-pence three-farthings in copper, so as to constitute the precise amount of the debt; and although it has been held that a tender of 20 guineas, with a request to return the difference of 15 guineas, is a good tender as to 15 guineas, because the creditor has only to select so much and to restore the residue; it would be otherwise, if the tender were in bank notes of a larger amount than the debt, and would be insufficient, because it may be physically impossible for the creditor to take what is due and to return the difference.(c) And it is the only safe course to tender the fraction of a pound in specie, when accompanied with a tender of a bank note or sovereign. If, however, a creditor, to whom a tender of a bank note is made in payment of a fractional sum, object to receive it merely on the ground of the sum offered to be paid being less than the sum claimed, then although the creditor be required to return the difference between the bank note and the fractional sum, it has been held

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(t) 56 Geo. 3, c. 68.

(u) *Wade's* case, 5 Coke's Rep. 114, n. (b).

(x) *Brady* v. *Jones*, 2 Dow. & Ry. 305.

(y) *Thomas* v. *Evans*, 10 East, 101; 3 Bla. C. 304, n. 33; *Douglas* v. *Patrick*, 3 T. R. 683.

(z) *Dickinson* v. *Shee*, 4 Esp. R. 68. The language of the ancient plea, averring a tender, is *obtulit, &c.*

(a) Per Buller, J. in *Wright* v. *Reid*, 3 T. R. 554; *Grigby* v. *Oakes*, 2 B. & P. 526.

(b) *Polyglass* v. *Oliver*, Law J. 5, Exch. M. T. 1831; Chitty on Bills, 8th ed. 554, 555, and Id. 801; Peake's Evi. N. P. 3d ed. 259.

(c) *Bettersbee* v. *Davis*, 3 Campb. 70; *Spigbey* v. *Hide*, 1 Campb. 181; *Robinson* v. *Cook*, 6 Taunt. 336.

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to be a sufficient tender.(*d*) A tender of a part and proposed set-off as to the residue is insufficient.(*e*)

The tender must be unconditional and unqualified, because if the creditor were to accept it, the claim for any residue might be thereby prejudiced; therefore a tender of a named sum, insisting at the same time on a receipt in full, (*f*) or upon condition that it shall be received as the whole balance due, (*g*) or that a particular document shall be given up to be cancelled, is insufficient. (*h*)

The tender should be to pay on behalf of the debtor a named sum, produced and offered to be handed over to the creditor *without more;* and to avoid the risk of the counsel for the plaintiff being able on cross-examination of the witness called to prove the tender, to lead him to say that it was in some respects conditional or qualified, it would be as well to accompany the tender with a letter in the form stated in the note, and the person tendering the money should read and subscribe such letter as a witness immediately before he make the tender, and the creditor should have notice to produce the same on the trial; and a duplicate and the delivery of the original, and the service of the notice to produce, should be proved on the trial; for after the witness has thus read and subscribed such a letter, a jury would scarcely believe that he verbally vitiated the tender by annexing to it any qualification. (*i*)

A tender cannot be effectually *pleaded* if at any instant after the debt became due the party was not ready to pay, and espe-

(*d*) *Saunders* v. *Graham*, Gow's Ca. Ni. Pri. 121; *Black* v. *Smith*, Peake's R. 88; *Bettersbee* v. *Davis*, 3 Campb. 70; *Robinson* v. *Cook*, 6 Taunt. 336.

(*e*) *Brady* v. *Jones*, 2 D. & R. 305. Defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to plaintiff, "there take your demand," and at the same time delivered a counter claim upon plaintiff of 1*l.* 5*s.* and plaintiff said, "you must go to my attorney." *Per Cur.* Here a *larger* sum than that due is offered, and is accompanied by a counter demand in writing by the defendant upon the plaintiff. In both these respects this is an insufficient tender, and therefore the plaintiff is intitled to retain his verdict.

(*f*) *Glasscott* v. *Day*, 5 Esp. R. 48; *Huxham* v. *Smith*, 2 Campb. 21; *sed vide* *Cole and another* v. *Blake*, Peake's R.179; Starkie's Evid. tit. Tender.

(*g*) *Evans* v. *Judkins*, 4 Campb. 156.

(*h*) *Huxham* v. *Smith*, 2 Campb. 21.

Written notice of a tender.

5 *May*, 1833.

(*i*) Sir,—The bearer is directed by me to pay or tender to you the sum of £27 : 10*s.* 6*d.* (twenty-seven pounds, ten shillings and sixpence,) in respect of the debt or sum of money claimed by you, and such tender and offer is and will be made unconditionally and without any reserve, or any condition or terms whatsoever; and to avoid all possible doubt, I beg you to understand that the same sum of money is to be offered, paid and received without prejudice to any claim you may have on me for any larger or different sum of money. Dated this 5th day of May, A. D. 1833.

Your's, &c. *A. B.*

cially if in the case of a bill or note the debtor did not pay on presentment; for if a tender be pleaded, the plaintiff may reply a *prior* or a *subsequent* demand. (*k*) And as supposed valid tenders are often disproved on the trial, the safest course, in cases of the least doubt, is to pay the amount into court and not to *plead* the tender, though in that case the defendant will have to bear the costs to the time of such payment.

Tender by a tenant on the land.

There is a peculiarity in the law in favour of *a tenant*, who need not find out the landlord and make a personal tender to him, but may, just before sun-set on the day when the rent falls due, produce the sum then accruing due, and in the presence of witnesses, who should count the amount, declare that he produces the same ready to pay and as a tender of his rent to his landlord; and this suffices, although neither the landlord nor any person on his behalf be upon or near the land. (*l*)

Creditor's fresh demand.

If a proper tender have been made and certainly capable of proof, it will effectually prevent the plaintiff from commencing or proceeding in any action, unless he can prove a larger demand, or can show that after such tender and before the commencement of his action he made a *fresh demand*, and which must be of the precise sum tendered, or at least not of a larger sum, or it will be insufficient; (*m*) and the fresh demand must be made in person or by an authorized agent, (*n*) but a subsequent demand of one of several joint debtors is sufficient. (*o*)

Readiness and tender of accounts.

With respect to *contracts*, persons likely to be made defendants should frequently observe certain preliminary precautions. Thus the first duty of an agent, receiver, trustee, or executor, is to be *constantly* ready with his accounts, for neglect in this respect would be a ground for charging him interest and costs; (*p*) and if he neglect to deliver his account within a reasonable time after request, he will be liable to pay the costs of proceeedings at law (*q*) or in equity (*r*) against him, even though he may have tendered a sum in gross which turns out to have been more than sufficient to cover the balance ultimately found due from him; for a principal has a right to have the materials before him, enabling him to ascertain and decide for himself what is the just balance, and until proper accounts be furnished he may reasonably suspect that more than the sum tendered is due to him from the agent. (*s*)

(*k*) *Paine* v. *Peploe*, 8 East, 168.
(*l*) *Ante*, 486; see cases, Bac. Ab. tit. Tender.
(*m*) *Spigbey* v. *Hide*, 1 Campb. 181.
(*n*) *Coles* v. *Bell*, 1 Campb. 478.
(*o*) *Pevise* v. *Bowles*, 1 Stark. R. 323.
(*p*) *Pearse* v. *Green*, 1 Jacob & W. 135.
(*q*) *Topham* v. *Braddick*, 1 Taunt. 576.
(*r*) *Supra*, note (*p*).
(*s*) *Pearse* v. *Green*, 1 Jac. & W. 135; *ante*, 499—506, note (*s*).

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Obtaining a set-off.

We shall also find that in many cases a party who expects to be sued for a debt may at any time before the commencement of an action, purchase or obtain a negociable bill or note upon which the expected plaintiff is indebted, and may afterwards, if sued, avail himself of a set-off, but the authorities upon this subject will be more properly considered in the seventh chapter.

VII. Of repetition of the foregoing measures.

VII. Supposing all the precautionary measures thus suggested have been observed by the plaintiff or the defendant, it will still be necessary to consider whether there is adequate *evidence* to prove them in case of litigation, and if that be doubtful it will be important, before the intended defendant has been put on his guard and whilst he may be disposed to be candid, to obtain an *admission* of each material fact in writing, if possible, and in explicit terms, at least sufficient in the case of a debt to constitute a sufficient written acknowledgment of the debt within the recent act; (*t*) and if an admission in writing cannot be obtained, then a verbal admission in the presence of two or three persons, who will be competent and credible witnesses; for after litigation has commenced or been even threatened, it may be difficult even to extort by bill of discovery a sufficient admission.(*t*) Supposing such admission cannot be obtained, then before any proceedings have been commenced, the suggested precautionary measures should be *repeated*, in doing which it will be advisable to refer to the antecedent steps as already taken, and to the party's want of candour rendering its repetition expedient, so as to prevent any supposition of *improper delay*. (*u*) The form of such *repeated notice or request* may be to the effect suggested in the note. (*x*)

VIII. Of precautions to be observed by executors and administrators in general.

VIII. *Of the Precautions to be observed by Executors and Administrators.*—Perhaps there is no character or situation so much requiring precaution as that of an executor

(*t*) *Ante*, 440, 441; 9 Geo. 4, c. 14. (*u*) *Ante*, 440, 441.

Suggested form of a second notice or request.

Dated, &c.

(*x*) Sir,—I refer you to the notice given (or the request made) to you on, &c. whereby, &c. (copy or state the substance of the notice or request,) I regret that you have not complied with the terms of such notice (or request). In order to endeavour to avoid litigation I repeat my said notice (or request) and hereby again, &c. (stating the terms of the notice or request as suggested in the preceding pages.)

To Mr. &c. Your's, &c.

or administrator. Volumes have been written on this difficult subject, but one in particular characteristic of the great learning and ability of its author. (y) In the following pages I have attempted to give a concise practical outline of the principal rules to be observed by executors and administrators to prevent loss or personal responsibility, with some suggestions for the more secure fulfilment of these important offices. The subject may properly be arranged under the following *twenty-seven* heads:—

1. Of securing the property of a deceased and his will.
2. Of opening and reading the will.
3. The funeral.
4. What other acts may be performed before probate or letters of administration.
5. The inventory and valuing the property.
6. Of ascertaining whether debts be good or bad.
7. Of advertising for debts or credits.
8. Of obtaining probate of the will.
9. Of obtaining letters of administration.
10. Collecting the assets, carrying on trade and the care of assets.
11. Of prosecuting actions and suits and the costs thereof.
12. Of resisting claims, actions and suits.
13. When costs of actions or defences are allowed to an executor or administrator out of the assets.
14. When or not an executor may refer to arbitration.
15. When he may compromise.
16. When he must be ready to render an account.
17. What are assets in hand.
18. The consequences of some assets but not enough to pay an entire debt.
19. Of an executor or administrator retaining for his own debt.
20. The *order* in which debts must be paid.
21. Of giving a preference.
22. How that power may be controlled in equity.
23. Of the payment of the legacy duty.
24. Of the payment of legacies.
25. Of remuneration to an executor or administrator.
26. The residue and distribution.
27. Of actions and suits by and against executors and administrators, and the pleadings, proceedings and evidence therein.

(y) Williams on Executors, 2 vols. 8vo. one of the most able and correct works that has ever been published on any legal subject. See also Toller's Executor, Wentworth's Off. Ex. but more properly ascribed to Mr. Justice Dodderidge.

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1. Of securing the property and will of the deceased.

1. *Of securing the* PROPERTY *and the Will.*—Even before it is known who is the executor or the next of kin, and immediately upon the death of the deceased, any person may lawfully, without risk, *secure the property and the will,* and make an inventory of the property found, although it would be indelicate and injudicious so to interfere in the absence of the nearest relations, unless there be risk of loss or injury. A party merely performing acts of necessity or humanity, as locking up the goods, burying the deceased, or providing necessaries for his children or his cattle, will not amount to such an intermeddling as would render the party liable to be sued as executor. (*z*) And if he should be improperly sued in that character he might plead *ne unques executor* generally, or specially shewing only what he did. (*a*) The safest course, however, upon the death of a person possessed of very considerable tangible personalty, would be, when the executor or next of kin be unknown or absent, to obtain letters merely *ad colligendum bona defuncti,* which makes the party neither executor nor administrator, and would merely authorize the securing the property and not the sale or disposition. (*b*) A Court of Equity will not, however, *appoint a receiver* until letters of administration have been obtained, unless an adequate reason be assigned why letters of administration cannot be forthwith obtained. (*c*) It is the duty of an appointed executor, unless he has immediately renounced, to preserve articles *specifically bequeathed* as heir-looms or otherwise according to the testator's wish, and unless it be certain that there be a deficiency of assets to pay debts, they must not be applied even in the payment of debts. (*d*)

If an executor, after knowledge of his appointment, should neglect to secure the property and loss ensue, he would be personally liable for a devastavit; (*e*) and if an executor suffer any personalty to remain an unreasonable time (as more than six days) on land or property that has become the property of an heir or devisee, remainder-man or reversioner, it may be distrained as damage-feasant. (*f*) And the executor may justify, after proper application, entering the house of the heir to take away the goods, though he could not legally break open a chest

(*z*) *Stokes* v. *Porter,* Dyer, 166 *b*; Godolph. Pl. 2, c. 8, s. 6; 2 Bla. C. 507; 1 William's Exec. 139.

(*a*) *Douglas* v. *Forrest,* 1 Moore & P. 677; Com. Dig. Pleader, 2 D. 7; *The King* v. *Sutton,* 1 Saund. R. 274, note 3; *Noel* v. *Wells,* 1 Lev. 236; see form and notes, 3 Chit. Pl. 5th ed. 941.

(*b*) *Anonymous,* Dyer, 256 *a*; 2 Bla. C. 505; Went. Off. Ex. ch. 14, 14th ed.

(*c*) *Jones* v. *Frost,* 3 Madd. Rep. 1.

(*d*) *Clark* v. *Earl Ormonde,* Jacob, 108.

(*e*) 2 William's Ex. 1021, 1022, 1112, 1113.

(*f*) *Stodden* v. *Harvey,* Cro. J. 204; Plowd. 280.

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to take deeds and writings belonging to the personal estate, but must, in case of refusal to open the same, proceed by action. (*g*) And an executor, upon demanding papers or deeds to which he is entitled, is not bound to give an inventory and receipt, and if refused to be delivered without such vouchers he may support an action of trover. (*h*)

2. Of the will and opening the same.

2. *Of the Will and opening the same.*—We have seen the nature of wills of *personalty as well as realty*, (*i*) and that if any person "shall either during the life of a testator or after his death, steal or for any fraudulent purpose *destroy* or *conceal* any will, codicil or other testamentary instrument, whether of realty or personalty or both, he shall be guilty of a misdemeanor and liable to transportation for seven years, or fine or imprisonment." (*k*) But it is expressly declared that the criminal offence and proceeding for punishment shall not prejudice any civil remedy. (*l*) If the will be *criminally* withheld, it is clear that a magistrate might interfere summarily to compel delivery to the executor; and if withheld without any criminal intent, a party may be compelled in the *spiritual court* to exhibit the same, and would not be allowed to dispute the jurisdiction on pretence of *bona notabilia*; (*m*) and it should seem that even a solicitor cannot have a lien on an original will for his costs, as the detention thereof might retard or prevent the execution of the trust in favour of creditors and others. (*n*) And in a late case Sir John Nichol observed, "Practitioners have no right to keep wills in their possession. I have in several instances stated that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it, and the proper way is for the will to be brought into the Registry for safe custody, and whenever a compulsory process is necessary for that purpose, the expense must fall on the party occasioning it." (*o*)

A person who, from his nearness of relationship or other circumstances, may reasonably suppose that he has been appointed executor, may legally *open the will* immediately after the decease, in order to ascertain whether there be any directions as

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(*g*) Went. Off. Ex. 81, 202, 14th ed.
(*h*) *Cobbett* v. *Clutton*, 2 Car. & P. 471.
(*i*) *Ante*, 110 to 112, as to *personalty*; and *ante*, 351 to 365, as to *realty and personalty*.
(*k*) *Ante*, 144; 7 & 8 Geo. 4, c. 29, s. 22.
(*l*) Id. sect. 24.
(*m*) Swinb. Pl. 6, c. 12; Godolph. Pl. 1, c. 20, s. 2; *Brown* v. *Coates*, 1 Add. 345.
(*n*) *George* v. *George*, 18 Ves. 294; *Balch* v. *Symes*, 1 Turner, 87; and see *Baker* v. *Henderson*, 1 Clark & Fin. 28.
(*o*) *Cunningham* v. *Seymour*, 2 Phill. 250; as to a lien not prevailing against deeds held in trust, see *Baker* v. *Henderson*, 1 Clark & Fin. 28.

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to the *funeral;* but the most discreet course is to convene all the near relations who are within a reasonable distance to be present when the will is first read. (*p*)

3. Of the funeral expenses.

3. *Of the Funeral.*—It is the duty of the appointed executor or expected administrator in due time to bury the deceased, (unless he has directed his body to be delivered for dissection,) (*q*) and we have seen that the ceremony cannot legally be prevented; (*r*) and it is a legal as well as a moral duty for a husband to bury his wife; and if a party, in his absence, cause the ceremony to be performed in a proper way, he may sue the husband for the expense, although he never expressly authorized it. (*s*) And a husband is even liable to pay the funeral expenses of his wife though she lived separate from him and had a separate maintenance. (*t*) The funeral should be conducted in a style suitable to the quality, rank and station of the deceased *if he died solvent;* but if he died *insolvent,* then funeral expenses exceeding twenty pounds would not be allowed against creditors. (*u*) Extravagant charges in reference to these criteria are not allowed even against legatees or next of kin entitled to a distributive share of, or the residue of, the property. (*x*) But these greatly depend upon particular circumstances, and even 600*l.* for funeral expenses have been allowed, (*y*) and 193*l.* 12*s.* 6*d.* for mourning rings, where a general discretion was given to the executors, and the deceased left assets much more than sufficient to pay debts. (*z*) But if there be the least risk of ultimate insolvency appearing in the estate, then any funeral expenses beyond twenty pounds will be at the personal risk of those who authorize it. 79*l.* for the funeral expenses of a captain in the army were, in a late case, disallowed against a *creditor,* the executor having received only 129*l.* on account of assets; (*a*) and Bayley, J. seemed to think that the old rule which, in Lord Hardwicke's time, limited the sum to *ten pounds* for the funeral expenses of a person of condition *against creditors* would in the present day be *extended to,* but probably *not beyond, twenty pounds.* (*b*) Lord Holt, in his time, said, " in strictness no funeral expenses are allowed in

(*p*) See observations in *George* v. *George,* 18 Ves. 294.

(*q*) 2 & 3 Wm. 4, c. 75.

(*r*) *Ante,* 52.

(*s*) *Jenkins* v. *Tucker,* 1 Hen. Bla. 93.

(*t*) *Berlee* v. *Lord Chesterfield,* 9 Mod. 21, *sed vide Gregory* v. *Lockyer,* 6 Madd. Rep. 90; *ante,* 58, 59.

(*u*) *Hancock* v. *Podmore,* 1 B. & Adolp. 260.

(*x*) *Stackpoole* v. *Stackpoole,* 4 Dow's P. C. 227.

(*y*) *Offley* v. *Offley,* Prec. Ch. 261.

(*z*) *Paice* v. *Archb. Cant.* 14 Ves. 364.

(*a*) *Hancock* v. *Podmore,* 1 Bar. & Adolp. 260.

(*b*) Id. ibid.

the case of an insolvent estate, except for the coffin, ringing the bell and the fees of the parson, clerk and bearers; but not for the pall or ornaments; (c) but Dr. Burn observes, that the expense of the shroud and digging the grave ought to be added; (d) but clearly no allowance is to be made for feasts or entertainments. (e)

If the executor be absent, a stranger may order a suitable funeral, and the executor, if he have assets, will be liable to pay the expenses, the law implying his promise under such circumstances. (f) The act of a stranger, in directing a proper funeral and paying the amount out of his own monies, or from the assets of the deceased, will not render him liable to be sued or otherwise as an executor *de son tort.* (g) At all events, a demand for mourning for the widow and family of the deceased, cannot be ranked or allowed as part of the necessary funeral expenses. (h) The circumstances of a funeral having been permitted to pass over private property not in the line of a public or private way, will afford no presumptive evidence of a right of passage on other occasions, and therefore there is no risk of creating a right by granting permission to pass on a particular occasion. (i)

4. What other acts an executor or administrator may do before probate or letters of administration.

4. Before probate an executor may effectually do most acts that he could enforce afterwards, (k) because, by the *very appointment* the testator has evinced personal confidence in his nominee, and therefore the interest of an executor arises not from the probate, but from the will, and for the same reason it has been held that he may release a debt or assign a term for years before probate; (l) he may collect and secure assets; (m) receive debts, and give effectual receipts; (n) and he may even effectually assent to a legacy, (o) or issue a commission of bankruptcy. (p) So he may issue a writ and arrest a debtor, though in strictness *he cannot declare*, because he cannot truly make the necessary profert of the probate. (q) But if probate should be obtained after a declaration, containing an averment that the

(c) *Shelly's case*, 1 Salk. 296; *Stag* v. *Punter*, 3 Atk. 119.

(d) 4 Burn. Ec. L. 348, 8th ed.

(e) Went. Off. Ex. 31.

(f) *Rogers* v. *Price*, 3 Y. & J. 28; but see 2 Wms. 1100. If the executor has ordered the funeral, he may be sued by the undertaker either in his private character or as executor, *Tugwell* v. *Heyman*, 3 Campb. 298, S. P.

(g) 1 Williams on Ex. 139.

(h) *Johnson* v. *Baker*, 2 Car. & Payne, 207, *cor.* Best, C. J.

(i) 2 Burn's J. 870.

(k) Toller, 6 ed. 45, 46, in general.

(l) *Hudson* v. *Hudson*, 1 Atk. 460.

(m) Went. Off. Ex. 34, 35, 92; Toller, 46.

(n) Went. Off. Ex. 35; Toller, 45.

(o) Toller, 6 ed. 46, 312; 11 Vin. Ab. 204; Went. Off. Ex. 35.

(p) *Ex parte Paddy*, 3 Maddox, 241.

(q) 1 Rol. Ab. 917, A. 2; Toller, 46, 47; 1 Williams' Ex. 163.

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plaintiff *then* was executor, that allegation will be sustained upon the trial, if the plea should take issue on that allegation, for it relates back, unless the defendant crave oyer and set out the subsequently dated probate. (r) The proper course, therefore, on behalf of a defendant, is not merely to plead, denying that the plaintiff is executor, but to crave oyer, and *thereby to suspend* the proceedings until it has been complied with. (r) The same rule prevails *in equity*, so that in strictness an executor should not file a bill until he has previously proved; for if the defendant should *plead, that the complainant had not obtained probate as alleged*, such plea, if true, might prejudice the proceedings. (s) If there be any risk of the statute of limitations becoming a bar to a proceeding for a debt, in case of further delay, or of a debtor escaping out of the jurisdiction, then a writ and arrest before probate would be proper.

A person appointed executor, although he has not proved, may and ought to *present for payment bills and notes*, the property of the deceased, at the exact time when they will fall due, though it is said that the neglect before probate would not discharge the drawer or indorsers. (t) He should also give due, that is immediate, notice of dishonour, so as to prevent loss. (t)

An executor may *be sued* before probate, if he have acted in that character. (u) And a notice to quit, served upon the widow of a deceased tenant, if no other person has already obtained probate or administration, is sufficient. (x)

It has been said, that the next of kin, or a person who expects to obtain letters of *administration*, can do no act whatever before he has *actually* obtained the same. (y) But it has been considered that he might file a bill in Chancery, although he may not be able to commence an action at law. (z)

Certainly both an appointed executor or an expected administrator may, before probate or administration, have power to do many acts, such as collecting, securing, and ascertaining the value of the property, so as to enable him to make affidavit

(r) *Thompson* v. *Reynolds*, 3 Car. & P. 123. The same rule extends in equity to a *bill* filed before letters of administration, and in equity it suffices to obtain them before the *hearing*, *Fell* v. *Lutwidge*, 2 Atk. 120.

(s) *Simons* v. *Milman*, 2 Sim. 241; but see Toller, 95. And it should seem that in general, probate before hearing suffices, *Humphreys* v. *Humphreys*, 3 P. Wms. 351.

(t) Poth. pl. 46; Molloy, 32, c. 10, pl. 24; Marius, 134; Chitty on Bills, 8 ed. 389. But *semble*, the want of probate might excuse delay, Roscoe on Bills, 147; 2 Williams, 1171.

(u) Wentw. 86; Toller, 47, 49; *Douglas* v. *Forrest*, 4 Bing. 704.

(x) *Rees* v. *Perrott*, 4 Car. & P. 230.

(y) Toller, 6 ed. 95, cites 11 Vin. Ab. 202; *Winkford* v. *Winkford*, Salk. 301; 4 Burn's Ecc. L. 242.

(z) *Fell* v. *Lutwidge*, Barnardis. 1326; 4 Burn's Ecc. L. 95; Toller, 95.

that the same do not exceed a certain value, as required by statute; (a) and such preliminary steps may obviously be necessary, as letters of administration do not usually issue till after the expiration of fourteen days from the death of the intestate, unless for special cause. (b) It is also clear, that if a person reasonably expecting to obtain letters of administration as an administrator, before he is formally invested with that character, so as to subject himself to be sued as executor *de son tort*, he may, if so sued, and in case he obtained lettters of administration pending the action, plead a retainer, and support such plea by rejoining that he has *puis darrien continuance* duly obtained such letters of administration. (c)

5. Of the inventory and valuing the property.

5. *Of the Inventory and valuing the Property.*—An executor or administrator should, immediately after the funeral, if not before, cause an *inventory* and *valuation* to be made, upon stamped paper, of all the personal property of the deceased at the time of his death, (d) by two competent and disinterested persons, usually sworn appraisers, who should sign the same, and whom he might afterwards, if necessary, call as witnesses to the authenticity and fairness of the valuation, before any sale or disposition has been made. (d) This is a duty enjoined by the statute 21 Hen. 8, c. 5, s. 4, and in effect *repeated* by the 55 Geo. 3, c. 184, s. 38, which require the executor or administrator to *swear* that the value is under a named amount; and it is obvious that the neglect to make a *full inventory* is calculated to excite suspicion, and expose the personal representative to difficulty in regard to the claims against the estate, whether of creditors or others.

It is not, however, now usual to exhibit *an inventory* or valuation to the spiritual court, except upon the *citation* of an interested party, as a creditor or legatee. The executor or administrator is however compellable, upon such citation, to exhibit the *inventory*, even at the instance of a person clothed with the colour or appearance of any interest. (e) But the right to call for an inventory may be lost by the neglect to require it for a great number of years; (f) and the spiritual court exercise a discretion as to the *sort of* inventory it will accept, particu-

(a) 55 Geo. 3, c. 184, s. 38.
(b) Toller, 6 ed. 96.
(c) 2 Stra. Rep. 1106.
(d) Toller, 6 ed. 248. It seems the profits of carrying on *a trade after his death* need not be noticed, *Pitt* v. *Woodham*, 1 Hagg. R. 250.
(e) *Phillips* v. *Bigwell*, 1 Phill. Ec. C. 241; *Middleton* v. *Rushout*, 2 Id. 57; Toller, 6 ed. 249; 2 Williams, 642.
(f) *Ritchie* v. *Rees*, 1 Add. 144; *Pitt* v. *Woodham*, 1 Hagg. 247.

larly in complicated cases. (*g*) In the present state of the practice, and in order to save the commission of a per-centage,

(*g*) *Reeves* v. *Freeling*, 2 Phil. 56. It is usual to file a *declaration* where the executors have not reduced *all* the property into possession, and to file an *inventory when they have*. In substance the form of the *inventory* is the same as the *declaration*, excepting in the introductory words. In the latter it is termed "a true, full, plain, perfect, and particular inventory," and the parties exhibiting it are called throughout "*exhibitants*," instead of "*declarants*." In many cases, upon a *citation* in the Prerogative Court, an executor has to deliver what is termed a *declaration*, accompanied with an account, upon oath, as in the subscribed form.

Form of executors' *declaration* of assets, as in lieu of a full inventory.

In the Prerogative Court of Canterbury.

A Declaration (instead of a true, full, plain, perfect, and particular *Inventory*) of all and singular the goods, chattels and credits of *A. B.* late of, &c. party in this cause, deceased, which at any time since his death have come to the hands, possession or knowledge of *C. D.* widow, the relict, and *E. F.* and *G. H.*, three of the executors named in the will of the said deceased, made and given in by virtue of *the corporal oaths* of the said *C. D.*, *E. F.* and *G. H.*, follows, to wit,

First, These *declarants* declare that the said deceased was, at the time of his death, possessed of sundry articles of wearing apparel, the particulars of which these declarants are unable to set forth, but the whole of which did not together exceed in value the sum of ten pounds, as these declarants verily believe	10	0	0
Also, These declarants declare, that the said deceased was, at the time of his death, possessed of cash in the house in which he resided amounting to the sum of nineteen pounds	19	0	0
Also, These declarants declare, that the sum of two pounds nine shillings was due to the said deceased, at the time of his death, from the banking department of the Bank of England	2	9	0
Also, These declarants declare, that the said deceased was, at the time of his death, possessed of sundry articles of household furniture, plate, linen, china, and other effects, in the house and premises at Mill Wall, Poplar, in the county of Middlesex, in which he resided at the time of his death, the whole of which were, shortly after the death of the said deceased, valued by *J. K.* of Ratcliffe Highway, sworn appraiser, as being together of the value of eight hundred and twenty-five pounds fifteen shillings, and these declarants have since sold part of the said effects, consisting of some of the effects on the wharf and out-door premises, for the sum of two hundred and ninety pounds, and the remainder of the said effects still remain in the possession of these declarants, but the declarants decline to charge themselves with the difference between the said two last-mentioned sums until they shall have received the same	290	0	0

Here followed the statements and account of several other items of the deceased's property, and then concluded as follows:

Lastly, These declarants *declare*, that no further or other goods, chattels or credits, of or belonging to the personal estate or effects of the said deceased, have, at any time since his death, come to the hands, possession or knowledge of these declarants, save and except what are contained and set forth in the aforegoing *declaration*, to the best and utmost of their recollection and belief ....

On the 14th day of January, 1833, the said *C. D.* and *G. H.* were duly sworn to the truth of the foregoing declaration,
Before me, *John Danberry*, Surr.
Pres. *Wm. Slade*, Not. Pub.

[*Names subscribed in full.*] C. D.
G. H.
E. F.

On the 14th January, 1833, the said *E. F.* was duly sworn to the truth of the aforegoing declaration,
Before me, *John Danberry*, Surr.
Pres. *Wm. Slade*, Not. Pub.

payable to two sworn appraisers for their valuation, an executor or administrator would act safely by having an accurate inven-

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Form of executors' account upon oath thereupon, and annexed to the said declaration.

A *true and faithful* account, made and entered by *C. D.* widow, the relict, and *E. F.* and *G. H.* three of the executors named in the last will and testament of *A. B.* late of Mill Wall, Poplar, in the county of Middlesex, deceased, of and concerning all and singular the goods, chattels and credits of the said deceased, which at any time since his death have come to the hands, possession or knowledge of them, or either of them, follows, to wit,

The Charge.

	These accountants charge themselves with the sum of two thousand three hundred and ninety-one pounds, being the sum total or amount of the several sums stated in the declaration hereunto annexed to have been received by them, or on their account, and also with the possession of or claims, upon the several goods, chattels and credits, of or belonging to the personal estate and effects of the said deceased, set forth in the said declaration	2391	0	0

The Discharge.

First,	These accountants crave to be allowed the sum of eighty-three pounds one shilling, so much having been paid by them for the expenses attending the funeral of the said deceased............	83	1	0
Also,	These accountants crave an allowance of thirty-eight pounds nine shillings, so much having been paid by them for mourning clothes furnished to the family of the said deceased..........	38	9	0
Also,	These accountants crave an allowance of five hundred and twenty-three pounds nine shillings, so much having been paid by them to *W. M.* the ground landlord of the leasehold premises held by the deceased, and described in the declaration hereunto annexed, for rent due to him for the said premises up to the 24th June, 1832	523	9	0
Also,	These accountants crave an allowance of twenty pounds nine shillings and ninepence, so much having been paid by them for king's taxes due on the said premises	20	9	9
Also,	These accountants crave an allowance of ninety pounds eight shillings, so much having been paid by them for parochial and other rates due on the said premises........................	90	8	0
Also,	These accountants crave an allowance of thirty-six pounds five shillings, so much having been paid by them for sundry necessary repairs done to the said premises	36	5	0
Also,	These accountants crave an allowance of five pounds five shillings, so much having been paid by them to *G. G.* for appraising the household furniture and other effects of the said deceased	5	5	0
Also,	These accountants crave an allowance of one hundred and twenty-four pounds five shilling and fivepence, so much having been paid by them to Messrs. *P.* & *Co.* of, &c. auctioneers, on account of their charges relating to the attempted sale of the said leasehold premises and sale of the aforesaid out-door effects	124	5	5
Also,	These accountants crave an allowance of thirty pounds two shillings and sixpence, so much having been paid by them to Mr. *P. G.* for costs of suit in an action brought against them as executors, named in the will of the said deceased, by Messrs. *J.* painters and glaziers, for a bill due to them from the said deceased	30	2	6
Also,	These accountants crave an allowance of one hundred and sixty-one pounds, so much having been paid by them to Mr. *R. W. V. W.* solicitor, for the expenses attending the probate of the said deceased's will	161	0	0
Also,	These accountants crave an allowance of two hundred and fifty pounds, so much having been paid by them to the said Mr. *R. V. W.* for law business done for them in their character of executors of the said deceased	250	0	0
Also,	These accountants crave an allowance of all and singular such costs, sum or sums of money, which they have already, or shall or may hereafter necessarily lay out, expend, or be put unto, for or by reason or means of this present or any future suit or suits, either at law or in equity, or otherwise howsoever, as executors of the will of the said deceased..............................			

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tory made by any competent person, and then obtain the written consent of all persons interested in the assets, or at least of the legatees, or residuary legatee, to save the expense of a valuation, which would unnecessarily fall upon the latter.

6. Of advertising and ascertaining whether the debts to the estate are good.

6. *Of ascertaining whether Debts to the Estate are sperate or desperate, and of endeavouring to collect Assets.*—The inventory we have just alluded to should, it is said, distinguish such debts as are sperate and good from those which are doubtful or desperate, (*h*) particularly as the probate stamp may be thereby influenced; (*i*) and independently of the necessity or importance of making out a formal inventory, it is a prudent measure for the executor or administrator to ascertain as soon as possible the amount and nature of the debts due to and from the testator at the time of his death, and the possibility of realizing those claims which are due to the estate. It is also his duty to collect in and demand and enforce restoration, within a reasonable time, of all goods withheld from him in his representative character. The non-observance of these duties may subject the executor or administrator to personal responsibilty, should any loss accrue from his neglect. The law authorizes him to enter the house of the deceased, though it be freehold and does not pass to him, and take thereout the goods of the deceased; but neither a door, nor a drawer or chest can be

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Also, These accountants crave to retain all and singular the goods, chattels and credits, of or belonging to the personal estate and effects of the said deceased, which now are or hereafter may come into the hands or possession of these declarants, or either of them, to the extent of the amount which may hereafter appear to be due to the representatives of the said *J. B.* the younger, deceased, and to those of the said *J. H.* deceased, upon the bonds mentioned in the inventory hereunto annexed, for the purpose of paying and discharging the said bonds, the said representatives of the said *J. B.* the younger, and those of the said *J. H.* being, as these declarants believe, the only specialty creditors of the said deceased..

On the 14th day of January, 1833, the said *C. D.* and *G. H.* were duly sworn to the truth of this account, } *C. D.* *G. H.* *E. F.*
Before me, *John Danberry*, Surr.
Pres. *Wm. Slade*, Not. Pub.

On the 14th January, 1833, the said *E. F.* was duly sworn to the truth of this account, }
Before me, *John Danberry*, Surr.
Pres. *Wm. Slade*, Not. Pub.

(*h*) Toller, 248; 2 Williams, 644.
(*i*) According to *Moses* v. *Crafter*, 4 Car. & P. 526, probate duty need not be paid on *probably bad debts.*

broken for the purpose, although the heir or other person refuse to permit the executor to take the goods. (*k*)

7. Of advertising for claims due to and from the estate, but avoiding personal engagements.

7. *Advertising for Debts and Credits.*—Upon the death of a party who, it is supposed, may have died entitled to property or owing debts to some unknown creditors, it is a usual and proper precaution, in cases of the least doubt, shortly after the funeral to publish an advertisement in the principal newspapers for debtors to pay their debts and claimants to send in the particulars of their claims to a named person; and this is essential before the speedy payment of ***simple contract creditors,*** and still more before the *payment of legacies;* for if without such advertisement and without suit an executor or administrator should ***hastily*** pay a simple contract creditor, and afterwards specialty debts should appear, he may be liable to the consequences of a misapplication of assets and devastavit. (*l*) In such advertisement care should be observed not to make an unqualified engagement to pay any debts which might bind the party or take out of the statute of limitations a debt otherwise barred by it, (*m*) but the sending in of claims should merely be required, and so guardedly as either to be silent with respect *to payment,* or at most to intimate the *uncertainty* that any claims will be paid, but only that they will be ***inquired into*** and considered. An executor or administrator must cautiously abstain from making any representation or engagement that might subject him to personal liability. Thus where *B.* having died indebted to *G.* for work, and his executors incautiously signed a memorandum on the back of *G.*'s account, thus—"Mr. *G.* having consented to wait for the payment of the within account, we, ***as*** the executors of *B.*, engage to pay Mr. *G.* interest for the same at 5*l.* per cent. until the same is settled;" it was held that the executors were ***personally*** liable to pay the debt and interest, because the original debt did not carry interest against the estate, and therefore the engagement must be considered ***personal.*** (*n*) The form of the public notices are usually as in the subscribed note. (*o*)

(*k*) See 2 Williams, 601, 402; *Anthony* v. *Harvey*, 8 Bing. 186; 1 M. & Scott, 300, S. C.; *ante*, 512, 513.

(*l*) See *Davis* v. *Blackwell*, 9 Bing. 10.

(*m*) *Jones* v. *Scott*, 1 Russ. & M. 255.

(*n*) *Bradley* v. *Heath*, 3 Simons, 543.

General notice on behalf of executor to pay debts and send in claims and for discovery of effects.

(*o*) WILLIAM FARMER, ESQUIRE, [or Mr. William Farmer,] deceased. All persons INDEBTED to or having any CLAIM upon the ESTATE of the said WILLIAM FARMER, late of ——, in the county of ——, deceased, and heretofore of ——, are requested forthwith to send the amount and full particulars thereof TO US in order that proper acquittances for the former may be prepared, and that the propriety of the latter may be examined and considered; and in default thereof all claimants will be

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8. Of obtaining probate of a will.

8. *Of Proving a Will.*—In general, within a very short time after the death *and funeral*, and as soon as the named executor has ascertained the probable value of the personal estate, without deducting the amount of debts due from the deceased, he should obtain probate, so as to have that document ready to produce and to remove all objection to his right to receive and enforce payment of the debts. But *at law* it suffices in general to prove within *six calendar* months, though if delayed after that time a penalty of 100*l.* and 10*l.* per cent. on the property would be incurred. (*p*) And if there be a suit or dispute relative to the will or administration, the probate or letters of administration should be obtained within two months after it has been ended. (*q*) Regularly, it is said *testaments* ought to be *insinuated* to the official or commissary within *four months* next after the testator's death, and the ordinary *may* sequester the goods of the deceased until the executors have proved the testament. (*r*) So that in strictness, and to prevent any proceedings in the Ecclesiastical Court against an executor, especially when the personal property is considerable, the will should be proved within *a reasonable time* after the death, and the statute provides for a further stamp and for a return of duty in case it should afterwards be discovered that there were more or less assets than had been supposed. (*s*) With respect to the amount of *the sum* for which the probate should be obtained in the first instance, it should seem not to be necessary to include in the amount a *desperate* or *doubtful* debt before it has been actually recovered and received, (*t*) but the probate should

peremptorily excluded from any benefit of the said estate. Any person giving to us any information so as to discover any at present unknown property belonging to the said estate will be liberally rewarded by the executors.

A. B. and Co., Solicitors to the Executors, No. —, Lincoln's Inn Fields.

The like, more concise.

PHILIP EDRIDGE, senior.—All persons having CLAIMS or DEMANDS on the ESTATE of *P. E.*, late of ——, in the county of ——, deceased, are requested forthwith to send the particulars to Mr. *G. H.*, of ——, or to Mr. *I. K.*, of ——, the executors. And all persons indebted to the estate are also requested to pay such debts to one of the executors before named.

The like, under a decree.

Pursuant to a Decree of his Majesty's Court of Exchequer, made in a cause of "*Davis and another* v. *Tomkyns*," the Creditors of *T. T.* late of ——, in the county of ——, Esq., the intestate in the pleadings in the above cause named, (who died in or about the month of ——, A. D. 1833,) are to come in and prove their debts before Jefferies Spranger, Esq. one of the Masters of the said Court, at his chambers, 2, Mitre-court-buildings, in the Inner Temple, London; or, in default thereof, they will be excluded the benefit of the said decree.

A. B. & Co. Lincoln's Inn, Plaintiff's Solicitors.

(*p*) 55 Geo. 3, c. 184, s. 37.

(*q*) Id. ib.

(*r*) Godolph. Pl. 1, c. 20, s. 2; and see *Cunningham* v. *Seymour*, 2 Phil. Ecc. C. 250; *ante*, 513, n. (*o*).

(*s*) 1 Williams' Exec. 373, 379, 380, 391; *Moses* v. *Crafter*, 4 Car. & P. 524.

(*t*) *Moses* v *Crafter*, 4 Car. & P. 526.

nevertheless be to the extent of the sum really *expected* to be received. (*u*) This indeed is enjoined as well in obtaining probate as letters of administration, by the statute 55 Geo. 3, c. 184, s. 38, which enacts, that Ecclesiastical Courts shall not grant either without affidavit or affirmation of the value of the effects, *without deducting any thing on account of debts due from the deceased,* and that the effects are in value under the named sum, to the best of *the deponent's knowledge.* (*x*)

From what judge or Court probate or administration should be obtained, and what constitute *bona notabilia,* and where.

With respect to the proper *judge* or *place* to whom or where application should be made for probate, this in general depends on the question whether all the *legal personal assets* were in one diocese or in several; if the former, then probate or letters of administration from the local and limited jurisdiction of that diocese will be proper; but if there were several *bona notabilia* (*that is, assets of five pounds value*), in several dioceses, then neither can legally grant probate or letters; and if they did, the same would be invalid, and the probate or letters must then be obtained from the proper *Metropolitan Prerogative Office,* where the whole is situate, as either from the Archbishop of Canterbury or of York, and if there be several *bona notabilia* in *several* dioceses of both, then there should be *two prerogative* probates or letters, i. e. one from each; (*y*) though if there be *notabilia* only in *one* diocese of the province of York, and also *notabilia* in only one diocese of Canterbury, then *each bishop* may grant separate probate. (*z*) *Bona notabilia,* by express canon, are fixed (excepting in London, where the sum is 10*l.*) to be *legal* personal estate to the value of *five pounds* or upwards, (*a*) though if several personal things, each under the value of 5*l.*, but collectively worth more than that sum, be dispersed in several dioceses, they constitute *bona notabilia,* and prerogative probate or letters must be obtained, if the party died in another diocese; (*b*) and a mere *claim* in the nature of a debt, however difficult to recover, if by possibility it may exceed 5*l.*, is *bona notabilia.* (*c*) But a *devise for payment of debts* is merely *equitable* assets, and not *bona notabilia.* (*d*)

There are, however, peculiar distinctions as to the *places* where different kinds of personal property shall be deemed,

(*u*) *Butler* v. *Butler,* 2 Phil. Rep. 39; 1 Williams, 379; see *post,* "Evidence."

(*x*) 55 Geo. 3, c. 184, s. 38.

(*y*) 1 Williams' Exec. 167, 175; *Burston* v. *Ridley,* 1 Salk. 39; *Shaw* v. *Stoughton,* 2 Lev. 86; *Stokes* v. *Bate,* 5 Bar. & Cres. 491; 8 D. & Ry. 247, S. C.

(*z*) 1 Williams' Ex. 175.

(*a*) Went. Off. Ex. 105, 106, 14 ed. In the diocese of London *bona notabilia* are rated at 10*l*, 1 Oughton, tit. 6, n. (*a*), pl. 3.

(*b*) Godolph. Pl. 1, c. 21, s. 1; Swinb. Pl. 6, s. 11, pl. 5.

(*c*) *Coates* v. *Brown,* 1 Add. 345, note (*a.*); 1 Williams, 177, 178.

(*d*) Wentw. Off. Ex. 109; 1 Williams, 179, 1036.

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assets, or *bona notabilia.* *Tangible goods* in *actual possession* are assets or *bona notabilia* in the diocese where they happen to be, if the owner die within the same, but if *they* be in one diocese, and the owner die in another, then they are deemed *bona notabilia* where they were; but as the owner died elsewhere, there must be prerogative probate or administration. (*e*) If the owner of moveable goods about him, when he dies whilst upon a *journey,* they by express canon are not to render it necessary to obtain a *prerogative* probate or administration, (*f*) and consequently probate from the *bishop* of the diocese where he resided is proper, though he died *in itinere* in another diocese, having *bona notabilia* then about him. (*g*)

A *simple contract debt,* and bills of exchange, and notes, and other *choses in action* (rights of *action*) due to the deceased, are considered to be *bona notabilia* in that diocese where the *debtor* inhabited at the time of the death of the creditor; (*h*) but there is an exception as to wages due for working in the king's yards and docks; (*i*) whilst a *Bond* or other *Specialty* debt due to the deceased is *bona notabilia* where the instrument or security may happen to be at the time of his death. (*k*) *Judgments* of Courts of Record are *bona notabilia* in the diocese where the same were recovered, as in Middlesex, in case of a judgment of one of the superior Courts sitting there, and *Statutes and Recognizances* are so where each was acknowledged. A *Lease for years,* when of 5*l.* value, or upwards, is *bona notabilia* where the deceased's lands lie; (*l*) as is an *Annuity* for years, when legally issuing out of a parsonage. (*m*)

If a *Canal* be situate in both provinces, but the office for transacting the business of it be in that of Canterbury, the probate of a will of a shareholder in Canterbury will suffice, and a probate in York will be unnecessary, (*n*) and it may happen that a mere diocesan's probate will suffice, although the canal passes through several dioceses of the same province. (*o*) But in general, if there be *bona notabilia* in both provinces, the archbishop in each is to grant probate accordingly. (*p*)

(*e*) 1 Rol. Ab. 909, Executors, 1, pl. 7; 1 Williams' Ex. 172.

(*f*) Went. Off. Ex. 167, 14 ed.; 1 Williams, 179, 180.

(*g*) *Doe ex demise Allen* v. *Ovens,* 2 Bar. & Adolph. 423.

(*h*) 1 Rol. Ab. 909; 1 Williams, 177, 178.

(*i*) 4 Ann. c. 16, 526.

(*k*) *Byron* v. *Byron,* Cro. Eliz. 472; 1 Williams, 178.

(*l*) *Daniel* v. *Duker,* Dyer, 305, *a.*; 1 Williams, 178.

(*m*) Id. ibid.

(*n*) *Smyth* v. *Stafford,* 2 Wils. Ch. Rep. 166; 1 Williams, 179.

(*o*) *Ex parte Horne,* 7 Bar. & Cres. 632; 1 Williams, 179.

(*p*) *Burston* v. *Ridley,* 1 Salkeld, 39; *Shaw* v. *Stoughton,* 2 Lev. 86; Off. Ex. 48; *Stokes* v. *Bate,* 5 B. & Cres. 491.

When all the personal estate is entirely in one diocese, then, however large the amount, *regularly* the probate *should* in general be obtained before the bishop of such diocese or his officer, and not in the Prerogative Court. (q) But if the Metropolitan or Prerogative Court grant probate or letters of administration in such a case, where the deceased had not any *bona notabilia* in divers dioceses, though this is not strictly regular, still such probate or letters are not void, but only voidable, (r) and this circumstance makes it safer, generally speaking, to obtain probate in the Prerogative Court; for if probate or letter of administration be granted by a bishop or other inferior judge, in a case where the deceased had *bona notabilia* in divers dioceses, they are absolutely void, (s) and the Court of Chancery usually require a prerogative administration before decreeing money to be paid out, (s) though Sir John Nichol has observed, that that administration is only essential when there really have been *bona notabilia* in several dioceses. (t)

If a person die abroad, or in Scotland, leaving goods in the diocese of London, and in no other diocese, prerogative probate or letters will be proper, but it may be in the Consistory Court of London; (u) and it should seem that the same rule would apply if a party die upon the high seas, in which case, if he have *bona notabilia* only in one diocese, probate or letters there are sufficient, though if he had been in several dioceses, then a prerogative probate or letters would be requisite. (x) If there be *bona notabilia* as well in Ireland as in England, then probates should be granted in both countries. (y)

On obtaining probate in the common form, the executor (with two of the witnesses to the will when living) and usually with his proctor, presents the *original will* to the proper judge, and the witnesses swear that the same "is the true whole and last will and testament of the deceased;" and the executor makes an *affidavit* in the subscribed form, and the judge thereupon, and sometimes upon less proof, annexes his probate and seal thereto. (z) The will itself should be deposited in the

(q) 2 Bla. C. 508.

(r) Id.; 1 Williams, 181, 182; *Stokes* v. *Bate*, 5 B. & Cres. 491.

(s) *Thomas* v. *Davies*, 12 Ves. 417; 1 Williams, 174, 175.

(t) *Scarth* v. *Bishop of London*, 1 Hagg. 636.

(u) *Scarth* v. *Bishop of London*, 1 Hagg. 625; 1 Williams, 172, 173.

(x) Id.; *Griffiths* v. *Griffiths*, Sayer, 83; Rol. Ab. 908; 3 Bac. Ab. 35.

(y) *Daniel* v. *Luker*, Dyer, 305; Bac. Ab. Executors, E. F.; Codex, 472.

(z) Swinb. Pl. 6, s. 14, pl. 2.; Godolph. Pl. 1, c. 20, s. 4; 1 Williams' Executors, 188. The following is the *form of the oath* to be taken by the executor: "You shall swear that you believe this to be the true last will and testament of *A.B.*, deceased; that you will pay all the debts and legacies of the deceased, as far as the goods shall extend and the law shall bind Executor's oath.

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Registry of the Ordinary of the Metropolitan, and a copy thereof in parchment is made out under his seal and delivered to the executor, together with a certificate of it having been proved before him, and such copy and certificate are styled *the probate.*

The *probate* itself is usually in the subscribed form, (*a*) and the executor must, in pursuance of 55 Geo. 3, c. 184, swear that the value of the assets is, to the best of his knowledge and belief, *under* a named sum, as thus: " Sworn under £——, and " that the testator died —— day of ——, A. D. *A. B.*" and which it seems is *prima facie* evidence at law against the executor that the assets are nearly the named amount, since it is to be presumed that he would not swear to and pay a much larger stamp duty than was necessary according to the assets received. (*b*)

Probate to *one* of several executors operates as if granted to all, so as to enable each to sue, (*c*) until the other has formally renounced.

A due application of the assets by the executor, either for general or particular purposes pointed out by the will, may be enforced by any party interested in the assets. (*d*)

Of executors *de son tort.*

An executor *de son tort* cannot retain for his own debt. (*e*) But a wrongful and a rightful executor only differ in this respect, that the first is to take no benefit by his own wrongful interference, but as regards other creditors there is no difference; and an executor *de son tort,* as well as a rightful executor, may administer the assets in due course of law, and in so doing, stands in precisely the same situation as a lawful executor. (*f*)

9. Of obtaining letters of administration.

9. *Of obtaining Letters of Administration.*—With respect to *letters of administration,* we have seen *who* is entitled to the same amongst next of kin, and if they refuse, then what other persons. (*g*) Administration is not generally obtained until after *fourteen* days from the death. (*h*) It is then granted by writing under seal from the proper judge, being the same person who

you, and that you will exhibit *a true, full, and perfect inventory* of all and every the goods, rights and credits of the deceased, together *with a just and true account* into the Registry of the —— Court of ——, when you shall be *lawfully called thereto.* So help you God." See form, 4 Burn's Ec. L. 254, 8 ed.

(*a*) See form of a prerogative probate, 1 Williams' Executors, 212.

(*b*) *Forster* v. *Blakelock,* 5 Bar. & Cres. 328; 8 Dowl. & R. 48, S. C.; *Curtis* v. *Hunt,* 1 Car. & P. 180.

(*c*) *Wallens* v. *Pleil,* 1 Mood. & M. 561.

(*d*) *Parry* v. *Ashley,* 3 Simons, 97.

(*e*) *Post.*

(*f*) *Oxenham* v. *Clapp,* 2 B. & Adolph. 309 to 315.

(*g*) *Ante,* 108 to 110.

(*h*) Toller, 6 ed. 96.

grants probate. (*i*) It may be also committed by entry in the registry, without letters *sub sigillo*, but it cannot be granted by parol. (*k*)

Upon taking out letters of administration, when the party applies merely as the *next of kin*, no *collateral proof* of his being next of kin is required, but the party merely alleges that fact before the surrogate, and he then swears to the time of the death, and that the whole value of the deceased's personal estate and leaseholds, without deducting for debts, are under the value of a named sum, to the best of his knowledge, information, and belief. (*l*) Upon such affidavit a *warrant* for issuing letters of administration is granted in the subscribed form. (*m*) After swearing to such affidavit before the surrogate, and after executing an *administration bond with two sureties*, in double the amount of the assets sworn to, for the faithful administra-

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(i) *Ante*, 523 to 526. (*k*) Toller, 120; 11 Vin. Ab. 76; Com. Dig. Adm. B. 7.

(*l*) The Affidavit as to such value is required by 55 Geo. 3, c. 184, s. 38.—The following is the usual form of *affidavit:*

Affidavit to obtain administration.

In the Goods of *C. D.*, deceased. In the Prerogative Court of Canterbury.

3d April, 1833.

Appeared personally *A. B.* of ——, the party applying for letters of administration of the estate and effects of the said *C. D.*, late of, &c., deceased, and *made oath* [in case of Quakers, *solemnly affirmed,*] that the said deceased died on or about the 1st day of March, in the year of our Lord one thousand eight hundred and thirty-three, and that the estate and effects of the said deceased, which he any way died possessed of or entitled to, and for or in respect of which said letters of administration are to be granted exclusive of what the said deceased may have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, including leaseholds (if any), and without deducting any thing on account of the debts due and owing from the said deceased, are under the value of three hundred pounds, to the best of this deponent's knowledge, information and belief. And lastly, this deponent made oath that, &c., (no leaseholds, if so.)

Sworn before me, *E. F.*,
Surrogate. *A. B.*

Warrant for granting administration.

(*m*) 5s. Stamp. 3d April, 1833.

Appeared personally *A. B.* and alleged that *C. D.*, late of, &c., deceased, died 1st March last, a bachelor and intestate, without a parent; that the appearer is the natural and lawful brother and next of kin of the said deceased, Wherefore he prayed letters of administration of all and singular the goods, chattels, and credits of the said deceased, to be granted to him on giving the usual security.

Sub £300.

Let administration be passed as prayed, the said *A. B.* having been first duly sworn faithfully to administer and as usual; as also that the whole of the said deceased's personal estate does not amount in value to the sum of three hundred pounds, and that the said deceased died on the 1st day of March, one thousand eight hundred and thirty-three.

Before me,
E. F., Surrogate.

Which I attest,
G. H. Notary Public.

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tion of assets as required by the statute, (*n*) the party applying obtains the grant, and the *letters of administration* are delivered to him.

The statute 22 & 23 Car. 2, ch. 10, prescribes the form of the bond. The sureties are too frequently little better than nominal, and considering that the bond frequently cannot be put in suit *till after a decree* in the Ecclesiastical Court, at least by legatees or parties entitled to the residue, (*o*) which may occupy years, in cases where the personal estate is considerable, the parties interested would do well to enter a caveat, or otherwise to take care that *very substantial sureties* are given before letters of administration are granted, as many instances have occurred, after a lapse of years, of total inability to pay legacies or divide the actual residue. (*p*) And a bill in equity to prevent waste should also be filed, in cases where loss would probably be otherwise incurred. (*q*)

An administrator, after obtaining letters of administration, stands in most respects in the same situation as an executor, and the cases relating to one in general equally apply to the other. (*r*) The office of an administrator, so far as it concerns *the collecting of the effects, the making of an inventory,* and the payment of debts, is altogether the same as that of an executor. (*s*)

10. Of collecting assets, carrying on trade, and care of the assets.

10. *Of collecting Assets, carrying on Trade, and care of the Assets.*—It is the duty of the executor or administrator to collect and speedily reduce into money the personal assets when not otherwise directed, especially if they be of a perishable nature, (*t*) and if he carry on the trade of the deceased, he does so at his peril, for though we have seen that any small subsequent profits need not be brought into or stated in an inventory when cited, (*u*) yet, on the other hand, if there be any considerable gain, it belongs to the estate, though if there be any loss, he must bear it, and an executor might, though he intended to derive no personal benefit, be made a bankrupt in respect of such trading. (*x*) If executors be directed by the will to carry on the trade, they should do so under the protection of the Court

(*n*) 21 Hen. 3, c. 5; 22 & 23 Car. 2, ch. 10; see Chit. Col. Stat. 324, and *Archbishop of Canterbury* v. *Tappen*, 8 Bar. & Cres. 155; 2 Man. & R. 136.

(*o*) Toller, 6 ed. 96; *Archbp. of Canterbury* v. *Tappen*, 8 Bar. & Cres. 150.

(*p*) It was so in the case referred to above, n. (*o*).

(*q*) *Parry* v. *Ashley*, 3 Simons, 97.

(*r*) Toller, 6th ed. 369.

(*s*) Id. ibid.

(*t*) Id. 427.

(*u*) *Ante*, 517, n. (*d*); *Pitt* v. *Woodham*, 1 Hagg. 250.

(*x*) *Wrightman* v. *Townroe*, 1 Maule & S. 412; 2 Williams, 1101.

of Chancery.(y) But in some cases it will be the duty of the executor to continue the trade so far as may be essential to complete orders in hand and wind up the concern.(z)

An executor should immediately after the funeral, without loss of time, request payment of all claims due to the estate, and, if not paid, should sue for the amount, unless there be reasonable grounds for doubting the success of proceeding, and if he delay, and allow the statute of limitations to become a bar, he would be personally liable for the loss to the estate.(a) If the assets be considerable, and it become necessary to deposit the same in the hands of bankers, rather than incur the risk of burglary or robbery, then the executor should be well assured of their responsibility, and should pay in the assets to his separate account, *as executor*, perfectly distinct from his *private* account, by which means he would avoid personal responsibility in case the banker should fail.(b) If an executor vest the assets in the funds, he will not be liable to make good a loss by the fall of stock.(c) But the safer course, unless indemnified by the residuary legatee, is to pay any balance of assets not immediately wanted into Court;(d) and he ought not to lend the assets on personal security or doubtful realty.(e)

11. *Of prosecuting Actions and Suits.*—An executor or administrator must take care expeditiously to enforce claims due to the estate, so as to prevent loss by a plea of the statute of limitation or other consequence of delay.(f) If there be any doubt upon the claim or the expediency of proceeding for its recovery, he should require the directions of all persons interested. In the next volume will be considered what claims can be enforced by an executor or administrator. It will suffice here to observe, that the right to sue for *torts* to the *person*, and even a promise of marriage, die with the person of the deceased;(g)

11. Of prosecuting actions and suits.

(y) *Ex parte Garland*, 10 Ves. 119; 2 Williams, 1101.

(z) *Marshal* v. *Broadhurst*, 1 Cromp. & J. 405; 1 Tyrwh. 350; 2 Williams, 1103.

(a) *Hayward* v. *Kinsey*, 12 Mod. 573; 2 Williams, 1111.

(b) *Wren* v. *Kirton*, 11 Ves. 377; *Fletcher* v. *Walker*, 3 Madd. 73; *Masserg* v. *Banner*, 4 Madd. 413; 1 Jac. & Walk. 241, S. C.; 2 Williams, 1117, 1118.

(c) *Hutchinson* v. *Hammond*, 3 Bro. Ch. Rep. 147; Toller, 428.

(d) *Eagleson* v. *Kingston*, 8 Ves. 408.

(e) *Wilkes* v. *Stewart*, Coop. 6; *Powell* v. *Evans*, 5 Ves. 844.

(f) *Supra*, (a); *Hayward* v. *Kinsey*, 12, Mod. 573; 11 Vin. Ab. 309; 2 Williams, 1111; so the merely employing an attorney to demand payment of a bond debt, but not suing, whereby the debt was lost, subjected the executor to pay the amount out of his own funds, *Lawson* v. *Copeland*, 2 Bro. Ch. R. 156; and see *Goodfellow* v. *Burchett*, 2 Vern. 299; Toller, 426.

(g) *Chamberlain* v. *Williamson*, 2 Maule & S. 408; 1 Chit. Pl. 5 ed. 21, 22, 78, 79; but see proposed alterations in some respects of the rule *actio personalis moritur cum persona* in the now pending bill.

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but the payment of debts and compensation for many injuries to personal estate may be enforced by an executor or administrator. (*h*)

At *law*, executors or administrators, when plaintiffs, are not *personally* liable to costs, when they have sued only on contracts alleged to have been made with their testator; although they be nonsuited, or have a verdict against them, (*i*) but it is otherwise, if a count be introduced upon a supposed contract with himself, though in his representative character; (*k*) and although no personal liability for costs affects the executor, yet the estate is liable, and therefore a residuary legatee is not a competent witness, although he have released his claim for the amount of debt sued for by an executor. (*i*) In equity, an executor, whether plaintiff or defendant, who, in performance of his duty, has incurred costs, *will be allowed them out* of the estate. (*l*)

12. Of resisting claims, actions, and suits.

12. *Of resisting Claims, Actions, and Suits.*—As, on the one hand, an executor or administrator is bound to use due endeavours to recover assets, so, on the other hand, he is bound to *resist* all *unfounded claims*, the payment of which would diminish the fund for creditors, legatees, or next of kin; as, if he pay a bond debt, which he knew he might have resisted on the ground of usury, or other illegality, such as future cohabitation; (*m*) or if he pay a debt contracted by the widow, in the name of a testator after his death, though unknown. (*n*) But it is optional whether an executor will plead or take advantage of the statute of limitations, (*o*) though a Court of Equity will, at the instance of a creditor or legatee, direct that defence to be set up. (*p*) A general direction in a will to pay all debts, or a devise of land to be sold to pay all debts, will not *revive* a debt already barred by the statute of limitations, (*q*) but the latter, or any will creating *a trust*, would suspend the *future* operation of the statute as to debts not already completely barred. (*r*) The whole of the law upon the subject of devastavits would lead us beyond the scope of the present undertaking. (*s*) The exercise

(*h*) 1 Chit. Pl. 22, 79, 80.
(*i*) *Baker* v. *Tyrwhit*, 4 Campb. 27.
(*k*) *Jobson* v. *Forster*, 1 B. & Adolph. 6; *Slater* v. *Lawson*, 1 Bar. & Adolph. 893.
(*l*) 2 Williams, 1252, 1253; *post*, 531.
(*m*) *Winchcombe* v. *Winchester*, Hobart, 167; 1 Brownl. 33; *Robinson* v. *Gee*, 1 Ves. sen. 254; Com. Dig. Administrator, I. 1; 2 Williams, 669, 1109.
(*n*) *Giles* v. *Dyson*, 1 Stark. R. 32; *Blades* v. *Free*, 9 Bar. & Cres. 171.
(*o*) 2 Williams, 1110.
(*p*) *Shewen* v. *Vauderhon*, 1 Russ. & M. 349.
(*q*) *Burke* v. *Jones*, 2 Ves. & Beames, 275; and see Chitty on Bills, 8 ed 613.
(*r*) *Ex parte Ross in re Coles*, 2 Glynn & Jam. 331; and see *post*, chap. ix. on statutes of limitations.
(*s*) See in general 2 Williams, 1104 to 1130.

of the power to prefer a particular creditor, and the control of that power will be presently considered.

13. When costs allowed to an executor or administrator. (t)

13. *When or not an Executor will be allowed his Costs.*—An executor or administrator would be allowed out of the estate his costs of an unsuccessful action *bonâ fide brought* or defended by him where there was a reasonable ground to institute or defend the action, and no laches or misconduct can be justly imputed to him. (*u*) But an executor conducting suits as solicitor for the legatees under the will of his testator, will not be allowed his costs in the first instance, if it appear that he had conducted the suits in a negligent and tardy manner. (*x*) So where an executor misconducts himself, and gives a false account, he will have to pay interest as well as costs; (*y*) and if an executor, having assets in hand, unnecessarily delay payment, and defend a suit, and afterwards suffer judgment by default for principal, interest, and costs, he will personally have to pay the two latter. (*z*) But in general the costs of a *bonâ fide* suit or defence are not to fall personally on the executor. (*a*) In doubtful cases it is prudent to require and take the directions and indemnity of the parties beneficially interested, or, where there will clearly be a residue, of the residuary legatee, as to the adoption of proceedings or defending them; and for this purpose, especially in cases of foreign claims, when the expense of a commission to obtain evidence, or on any other account, the suit would be attended with great expense, it would be prudent, though not absolutely necessary, to convene a meeting of creditors and legatees, and those entitled to the residue, and act with their concurrence. Executors, who plead a plea, which, on the trial, is proved false, (unless he have also pleaded a plea to the *whole* action, which has been found true,) is *personally* liable to pay costs to the plaintiff; (*b*) as if he plead ineffectually nonassumpsit or plene administravit, and do not succeed on any plea that goes to the whole action. (*c*) But he will be allowed such costs out of the assets, unless he has been guilty of misconduct in resisting a clear demand. (*d*)

(*t*) See several cases as to costs, Chit. Eq. Dig. tit. Executors, 409, 410.

(*u*) *Baker, executor*, v. *Tyrwhitt*, 4 Camp. 27, where Lord Ellenborough so ruled; *Wekett* v. *Raby*, 2 Bro. C. C. 386, and see 1 Stark. 32; 2 Williams, 1252.

(*x*) *Wilson* v. *Carmichael*, 2 Dow. and Clark, 51, A. D. 1830.

(*y*) *Crackley* v. *Bethune*, 1 Jac. & W. 586, 589.

(*z*) Toller, 6 ed. 426, *Seaman* v. *Everard*, 2 Lev. 40; *Hall* v. *Hullet*, 1 Cox's Rep. 134.

(*a*) *Wekett* v. *Raby*, 2 Bro. C. C. 386, in error, reversing decision below as to costs.

(*b*) *Marshall* v. *Wilder*, 9 B. & Cres. 655; 2 Williams, 1219.

(*c*) *Marshall* v. *Wilder*, 9 Bar. & Cres. 655.

(*d*) 2 Williams, 1252, 1253; see further *post*.

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14. When executor ought not to submit to arbitration or compromise, or give time.

14. *Submission to Arbitration.*—An executor or administrator should not refer a dispute to arbitration, at least without expressly restricting the arbitrator from awarding against him personally; nor indeed is any reference even with that qualification, but without the consent of creditors and legatees and of the next of kin, prudent; for if an executor refer generally, and the arbitrator should award him to pay, he will be personally liable, although assets have not actually come to his hands.(*e*) So if an arbitrator should award that a debt claimed by an executor as due to the estate is not due, and the same be thereby lost, the executor will be personally liable to pay the amount.(*f*) Also if an executor compromise or give time and take a new security, and the debt be thereby lost, he must sustain it.(*g*) But an executor, to get rid of a bad tenant, may release an arrear of rent and even give him money out of the assets to obtain possession, and if it appear he has *bonâ fide* acted for the best, he shall be allowed both.(*h*)

15. When he may pay all creditors equally.

15. *Of general Compromises with Creditors.*—But an executor (when there are some assets but not enough to pay all) may and ought properly, even without bill filed, to convene a meeting of creditors and propose an equal distribution, and if upon the faith of an agreement to that effect he executed an assignment of assets, one of the creditors, who assented, cannot afterwards refuse to come in, nor could he sue the executor.(*i*)

16. Executors accounting.(*k*)

16. *Accounting.*—An *executor* should at all times be ready, on the reasonable application of a creditor or legatee or next of kin, to render a just and explicit account of the assets and his administration, or he may be liable to pay interest or costs.(*l*) But there is not any regular way of calling an executor to account but by bill, and which ought not to be filed without formal demand of an account and refusal or unreasonable delay in rendering the same.(*m*)

17. What are assets in hand.

17. *What are Assets in Hand at Law.*—As an executor cannot compel a creditor to take goods in payment of any claim,

(*e*) *Taylor* v. *Lyon*, 5 Bing. 200.

(*f*) *Anon*, 3 Leonard, 51; Went. Off. Ex. 71, 159, 160; Toller, 425. But *semble*, this must mean when it is clearly proved that the debt might have been recovered by proceedings at law or in equity, and not that the executor is *absolutely* responsible.

(*g*) Toller, 5th ed. 425; *Goring* v. *Goring*, Yelverton, 10; *Norden* v. *Sevit*, 2 Lev. 189; 2 Jones, 88; Keilw. 52; *Barker* v. *Tulcot*, 1 Vern. 474.

(*h*) *Blue* v. *Marshall*, 3 P. Wms. 381; Toller, 429.

(*i*) *Brady* v. *Sheil*, 1 Campb. 147; *Steinman* v. *Magnus*, 11 East, 390.

(*k*) See in general 1 Chit. Eq. Dig. 409.

(*l*) *Pearse* v. *Green*, 1 Jac. & W. 135.

(*m*) *In mre.* v. *Burke*, 1 Ball & B. 75.

it should seem that *goods* are not actually assets, unless they have actually come to the possession of the executor or administrator, and might have been sold by him for money if he had used due diligence. (n) As to *debts due* to the estate and *choses in action* they are not assets in hand until actually reduced into possession, (o) though if the executor should release a debt or damages, or take a fresh bond or note to himself, that would be deemed in law equivalent to an actual receipt, and charge him accordingly. (p)

Property vested in the testator as a *trustee* for others, and terms attending the inheritance of the testator, are not assets, although the *legal* interest has vested in the executor or administrator. (q) Nor at law or in the Ecclesiastical Court are lands *devised* for the *payment* of debts or legacies, assets in respect of which either can be sued at law, but only in a court of equity, and not even in the Ecclesiastical or Spiritual Court, which has no cognizance of lands; and therefore, in case of such a devise, the creditor can, as respects such equitable assets, only proceed in a Court of Equity, and this although the testator has expressly declared that the produce of the sale of the real estate shall be deemed personalty. (r) This constitutes a most important distinction between legal and equitable assets. (s)

The words in a will, "In the first place, I will and direct all my just debts and funeral expenses to be paid," and afterwards devising the real estate specifically, constituted a charge on such real estate and *equitable assets*, but no proceeding *at law* can be sustained against or in respect of such assets. (t) Where bond or specialty debts have exhausted the personal estate, then simple contract creditors, and even legatees, may, in equity, under the doctrine of *marshalling the assets*, obtain satisfaction in a Court of Equity out of the real estates, to the extent of the fund subtracted by the bond and specialty creditors. (u) The modern act against fraudulent devises, and subjecting the *lands* of traders to the payment of even simple contract debts,

(n) See cases 2 Williams, 1021; but see the judgment of Lord Ellenborough in *Crosse* v. *Smith*, 7 East, 258; 6 Mod. 181; Com. Dig. Assets, D.

(o) Godolp. Pt. 2, c. 24, s. 5; *Jenkins* v. *Plume*, 1 Salk. 207; *Williams* v. *James*, 1 Campb. 364.

(p) *Coke* v. *Jenner*, Hob. 66; *Hosier* v. *Arundell*, 3 Bos. & Pul. 7; *Partridge* v. *Court*, 5 Price, 419.

(q) 2 Williams, 1031, 1032.

(r) *Barker* v. *May*, 9 Bar. & Cres. 489.

(s) See 2 Williams, 1033 to 1037.

(t) *Williams* v. *Williams*, 3 Ves. J.; *Bailey* v. *Ekins*, 7 Ves. 319; *Shephard* v. *Lutwidge*, 8 Ves. 26.; Chit. Eq. Dig. 417.

(u) As to *marshalling assets* in general, see Woodes. Vinerian Lectures; and Chit. Eq. Dig. 419 to 422.

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does not alter the proceeding at law, and the lands can only be affected in a Court of Equity.(x)

18. Some assets, but not enough to pay an entire debt.

18. *Some Assets, but not sufficient to pay the Whole of a Single Debt.*—Supposing an executor or administrator to have some legal assets, but not sufficient to pay the whole of a legal claim, it seems that if he be sued and correctly plead *plene administravit præter* the sum in hand, and the plaintiff pray judgment for the sum confessed, and *quando acciderient* to the residue, the executor or administrator will not be personally liable to pay costs, though the plaintiff will be entitled to them out of future effects, for an executor is not bound to pay away every trifle of assets the instant he receives the same.(y)

19. Of retaining by an executor or administrator.

19. *Of Retaining.*—As an executor or an administrator cannot *sue* himself, the law allows him, when he has been *legally* invested with his representative character, to retain out of any assets that may have come to his hands, to the extent of all funeral and testamentary expenses and debts *legally* paid by him out of his own pocket,(z) and also any debt due to himself, before he pays any other creditor in *equal degree.*(a) It has long been an acknowledged principle in courts of equity, that an executor paying to creditors more or equal to the value of his testator's personal assets, acquires an absolute right to them; indeed this principle equally extends to trustees of real estate, though in general a trustee is not allowed to purchase any part of the trust,(b) and for the same reason he may retain his own debt, notwithstanding a decree has been made in a suit by other creditors for administration of assets equally, and notwithstanding assets out of which he seeks to retain his debt came to his hands after decree;(c) but he cannot retain in respect of his own debt any assets from a creditor of a higher degree.(d) It should even seem that an executor may retain a debt due to himself and really unsatisfied, though barred by the statute of limitation;(e) and an executor who has

(x) 1 Wm. 4, c. 47; and see *Johnson* v. *Compton*, 1 Clark & Fin. Rep. 47.

(y) *De Tastet* v. *Andrade*, 1 Chit. R. 629; Tidd, 980, 9 ed.; 2 Williams, 1222, 1223; and see Rast. 323; *Shipley's case*, 8 Co. 134; *Noel* v. *Nelson*, 2 Saund. 226; 3 Chit. Pl. 5th ed. 943, 945, in notes.

(z) *Gillies* v. *Smither*, 2 Stark. R. 528, where the expenses of a funeral paid out of executor's own pocket were held to be properly retained.

(a) *Robinson* v. *Cummings*, 2 Atk. 411; *Cockroft* v. *Black*, 2 P. Wms. 298; 1 Saund. 333, n. 6; *Picard* v. *Brown*, 6 T. R. 558.

(b) *Chalmer* v. *Bradley*, 1 Jac. & Walk. 64.

(c) *Nunn* v. *Barlow*, 1 Sim. & Stu. 588.

(d) 2 Williams, 685, 1206.

(e) *Hopkinson* v. *Leach*, Mad. Ch. Pr. 583; 2 Williams, 693, *sed quære.*

paid to creditors more than the value of his testator's personal property acquires an absolute right to them.(*f*) Where there are joint executors, or joint administrators, they must *inter se* retain their debts rateably and in proportion to the assets.(*g*) It is optional to *plead* a retainer or give it in evidence under a plea of *plene administravit*,(*h*) but it is in general better to plead it specially, as the replication must then narrow the evidence.

To prevent a struggle amongst creditors in order to pay themselves, it is settled that an executor *de son tort* is not entitled to retain,(*i*) though if he obtain letters of administration pending the suit against him, he may rejoin the same *puis darrein continuance*, so as to sustain a previous plea of retainer, to which the creditor had replied that the defendant was executor *de son tort*.(*k*)

20. Of the order of paying debts and legacies.

20. *Of the Order in which Debts and Legacies are to be paid in general.*—It is of the utmost importance, when there are not sufficient assets *to pay all*, that the executor or administrator should in the first instance pay debts of the highest degree, and so on down to the most inferior,(*l*) for otherwise he will be guilty of what is termed a *devastavit*, and *personally* liable to the extent of the misapplied assets,(*m*) but no further.(*n*) And for the same reason he must, by pleading that a higher debt is outstanding, resist the payment of an inferior debt, or he will be liable to pay both.(*o*) Where, however, there are certainly sufficient assets to pay all, executors may pay simple contract debts not bearing interest, before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees in such a case are not at liberty to complain of the order of payment, although it is obvious that they may be prejudiced to the extent of the accumulating interest on the specialty debts.(*p*) So where the executor is quite certain that there is a sufficiency of assets already in hand, he may

(*f*) *Chalmer* v. *Bradley*, 1 Jac. & Walk. 64.

(*g*) *Chapman* v. *Turner*, 9 Mod. 268.

(*h*) *Loane* v. *Casey*, 2 Bla. R. 965; 1 Saund. R. 333, n. 6; 2 Williams, 693.

(*i*) *Coulter's case*, 5 Coke, 30; *Pudget* v. *Priest*, 2 Term Rep. 97; and this although he obtain the assent of the rightful administrator after administration granted, and though his debt may have been of a superior nature; *Curtis* v. *Vernon*, 3 T. R. 587; *per* Lord Tenterden in *Oxenham* v. *Clapp*, 2 Bar. & Adolph. 312 to 314.

(*k*) *Pyme* v. *Woodland*, 2 Vent. 180; *Vaughan* v. *Browne*, 2 Strange, 1106.

(*l*) *Davis* v. *Blackwell*, 9 Bing. 5.

(*m*) 2 Bla. Com. 511.

(*n*) 1 Saund. 336, n. 110.

(*o*) *Rock* v. *Leighton*, 1 Salk. 310; 1 Saund. R. 333, n. 8.

(*p*) *Turner* v. *Turner*, 1 Jac. & W. 39.

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voluntarily pay legacies even before the expiration of the year, though he need not do so, and will pay at the peril of superior claims afterwards appearing; (q) and consequently should always withhold payment until adequately indemnified.

The following is the order of payment in prudence to be observed, unless there be certainly more than sufficient to pay *every* description of debt.

1. *Funeral Charges.*—We have seen that these to the extent of 20*l.* will *probably* be considered reasonable, if the deceased were an officer in the army, or in a middling rank of society, although he died insolvent, though it would be safer not to exceed 10*l.*, a sum which has been long allowed for the funeral of a person even in the middling class of society. (r) Where the deceased died possessed of assets more than sufficient to pay all debts, then, as against legatees or the next of kin entitled to the residue, even a much larger sum may be allowed, and even presents of mourning rings, at the discretion of the executor. (s) If the executor himself ordered or assented to the funeral, he will be personally liable for the amount, without regard to the extent of assets, as upon his own contract. (t) To the above limited extent funeral expenses will be allowed, and recoverable from an executor even in preference to a debt to the crown; (u) and although he were absent, and did not concur in ordering the funeral. (v)

2. *The Expenses of proving the Will, or taking out Letters of Administration,* viz. the expense of valuing the property, the fees to the proper spiritual judge, and stamp duty; (x) and amongst these also may be arranged the costs of a suit in equity to administer the property; (y) but testamentary expenses do not include the costs of a suit occasioned by a will. (z)

3. *Debts to the Crown by Record or Specialty, &c.* (a)—But other debts to the crown not of record or specialty are to be postponed to debts of record due to a subject, (b) although Magna Charta would import that *all debts* to the *king* should be first paid. (c) By 33 Hen. 8, c. 39, all obligations and spe-

(q) *Angerstein* v. *Martin*, 1 Turner & Russ. 241; *Davis* v. *Blackwell*, 9 Bing. 5.

(r) *Ante*, 514.

(s) *Ante*, 514.

(t) *Ante*, 515, n. (*f*).

(u) *Rex* v. *Wade*, 5 Price's R. 627, *per* Richards, C. B.; 11 Vin. Ab. 432; Bro. tit. "Executor;" Doctor and Student, Dial. 210.

(v) *Ante*, 515, n. (*f*).

(x) 2 Bla. Com. 511; Off. Ex. 130, 1.

(y) *Loomes* v. *Stotherd*, 1 Sim. & Stu. 461; when otherwise, *Browne* v. *Groombridge*, 4 Madd. 495.

(z) *Brown* v. *Groombridge*, 4 Madd. 495.

(a) 2 Williams, 652; *Littleton* v. *Hibbins*, Cro. Eliz. 793; Com. Dig. Administration (C. 2.)

(b) 2 Williams, 653.

(c) 9 Hen. 3, c. 18.

cialties, taken to the use of the king, are of the same nature as a statute-staple; but as to sums of money owing to the king on wood sales, or sales of tin, or other his minerals, for which no specialty has been given, they shall not be preferred to a debt due to a subject by matter of record. (*d*) Fines and amercements in the king's courts of record (*e*) shall be preferred; but amercements in the king's courts baron, or courts of his honours, which are not of record, have no priority; (*f*) nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties, for these are not debts of record. (*f*) But whatever accrues to the king by attainder of felony or outlawry is considered as a debt by simple contract before office found; and the prerogative does not extend to a debt assigned to the king; so arrears of rent due to the crown, whether fee-farm rent, or rent reserved on a lease for years, are it appears debts by simple contract. (*g*) And a recognizance in the court of chancery by a guardian in the matter of a minor, is not to be considered a debt due to the crown. (*h*) Where the king's debt and that of the subject be both inferior to debts of record, the king shall be preferred. (*i*) By statute 55 Geo. 3, c. 184, s. 45, the commissioners of stamps are authorized in certain cases to give credit for the duties on probates and administrations; and by sect. 48 it is provided, "that the duty for which credit shall be so given shall be a debt to the crown, and shall be paid in preference to any other debt whatsoever."

4. *Debts secured by Statutes*, as money due from an overseer of the poor who dies whilst in office, (*k*) or money due in certain cases to a friendly society, (*l*) or from a treasurer or collector under the metropolis paving act to the commissioners; (*m*) and it has been suggested that some of these kind of enactments may even give a preference to a crown debt. (*n*) Debts to the post office for postages of letters not exceeding 5*l.* are to be preferred. (*o*)

5. *Debts of Record* in general, as *judgments* recovered in any courts of record against the deceased; and these are entitled to a preference before recognizances or statutes; (*p*) and this

(*d*) 3 Bac. Ab. tit. "Executors," (L.) 2.
(*e*) Godolph. pt. 2, c. 28, s. 3.
(*f*) Went. Off. Ex. 263, 14th ed.; Com. Dig. Administration, (C. 2.); 3 Bac. Ab. 80, tit. "Executors," (L.) 2.
(*g*) Id.; *sed quære, post*, 539, n. (*g*).
(*h*) 1 Ball & Beatt. 199.
(*i*) Bac. Ab. tit. "Executors."
(*k*) 17 Geo. 2, c. 38, s. 3.
(*l*) 10 Geo. 4, c. 56, s. 20; 2 Williams, 653.
(*m*) 57 Geo. 3, c. 29, s. 51.
(*n*) By Lord Alvanley in *Ex parte Lancaster Society*, 6 Ves. 99; 2 Williams, 656.
(*o*) 9 Ann. c. 10, s. 30; 2 Bla. 511.
(*p*) *Sadler's Case*, 4 Co. 59, b; 2 Williams, 657.

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priority equally extends to judgments of inferior as well as superior courts of record, even of a court of pie poudre. (q) And a *final* decree of a court of equity is entitled to a preference equally with a judgment at law, and shall stand in the same order of payment; (r) and though such decree is not pleadable at law as a debt outstanding, the executor may relieve himself by a bill in equity, and have an injunction; (s) and he ought cautiously to inquire whether there has been any decree before he pays a simple contract creditor. (t)

But unless a *judgment* of the superior courts at *Westminster* be *docketed*, it has been enacted and held, both at law (u) and in equity, (x) that in the administration of the ancestor's or testator's estates a judgment shall be considered only as a *simple contract debt;* and that if an heir or executor should plead to an action on a bond or simple contract an outstanding judgment, the plaintiff may reply that it was not docketed and entered according to the provisions of the statute. (y) The judgment must be docketed, and not merely the issue. (z) But the act does not extend to judgments of *inferior courts of record*, which therefore are still entitled to a preference, although they have not been docketed, (a) and of which therefore the executor must it seems take notice at his peril. (b)

We have seen that a judgment in the Lord Mayor's Court, obtained against the garnishee by foreign attachment, does not entitle the plaintiff to rank as a judgment creditor for a *debt* in the administration of the garnishee's assets; (c) and some other interlocutory judgments and decrees stand in the same situation. (d)

When there are several judgments, neither the order of time when they were recovered, nor the consideration or original debt, is material, and the executor or administrator may prefer the last; (e) and this although one judgment creditor has already proceeded by *scire facias*. (e)

6. *Recognizances and Statutes-Merchant or Staple* stand

(q) *Searle* v. *Lane*, 2 Vern. 89.

(r) *Shafto* v. *Powell*, 3 Lev. 353; 3 P. Williams, 401.

(s) *Stasby* v. *Powell*, 1 Freem. 334; *Harding* v. *Edge*, 1 Vern. 143; 2 Williams, 661.

(t) 2 Williams, 678.

(u) *Hickey* v. *Taylor*, 6 Term Rep. 384.

(x) *Landon* v. *Ferguson*, 3 Russ. Chan. Cas. 349; but see Tidd, 9th ed. 938 to 941; and Sugd. V. &. P. 8th ed. 685.

(y) *Steel* v. *Rooke*, 1 Bos. & Pul. 307; *Hickey* v. *Haytor*, 6 T. R. 384; *Hall* v. *Tapper*, 3 Bar. & Adolp. 655.

(z) *Braithwaite* v. *Watts*, 2 Cromp. & J. 318.

(a) 2 Williams, 660.

(b) 2 Williams, 677.

(c) *Ante*, 104; *Holt* v. *Murray*, 1 Simon's R. 485.

(d) 2 Williams, 658, 661.

(e) Went. Off. Ex. 269, 4th ed.; Toller, 264; 2 Williams, 660.

next in degree, and though to be postponed to *judgments* for debts, are to be preferred to specialty debts. (*f*)

7. *Rent, and Covenants and Contracts of Tenants.—Rent in arrear before the Death of the Tenant,* though due on a *parol* demise, and *not* secured by covenant or bond, stands in the same rank as to precedency in payment as *specialty debts,* and consequently to be preferred to simple contract debts; and this although the tenancy has expired, and the right of distress determined, or even though it has become due *since* the death of the tenant. (*g*) But it is said that an executor cannot, to an action on a bond, plead a payment of rent grown due since the testator's death, unless where the rent is *greater* than the profits of the land in the executor's time, in which case so much of the rent as exceeds such profits shall stand in equal degree with other debts by specialty; (*h*) and if the executor *enter,* he may be charged in the debet and detinet for the current half-year's rent which commenced before the testator died. (*i*)

As to rent which has altogether accrued due *after* the death of the lessee, and as to other breaches of covenant after such death, the law is somewhat complicated. If the executor or administrator have assets, he is always liable to be sued in his representative character in respect of such assets. But supposing he has not, still in the language of the law, if he have *entered on the demised premises,* (*i. e.* exercised any act of ownership with reference thereto,) then the lessor has an option either to sue him as executor, *or personally* in the *debet and detinet* in respect of his supposed perception of the profits, and he cannot in the latter case plead *plene administravit.* But if the land be of less value than the rent, the executor may plead the special matter, viz. that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the detinet and merely in respect of the assets of the testator. (*k*) But so long as the executor *retains possession* or exercises acts of ownership, he continues *personally liable as assignee* to pay the rent and perform the other covenants. (*l*) If the demised pre-

(*f*) 2 Williams, 662.

(*g*) *Thompson* v. *Thompson,* 9 Price, 476; Toller, 6th ed. 278 to 281; 2 Williams, 666, 688, 1107; Com. Dig. Administration, (C. 2.)

(*h*) Went. Off. Ex. c. 12, p. 286, 290, 14th ed.; 2 Williams, 667.

(*i*) *Burliffs* v. *Martin,* Cro. J. 411; *Gevens* v. *Harridge,* 1 Saund. 1.

(*k*) *Billinghurst* v. *Spearman,* 1 Salk. 297; *Buckley* v. *Pitt,* 1 Salk. 317.

(*l*) *Wigley* v. *Ashton,* 3 B. & Ald. 101. It was there held that if the executor be sued in assumpsit for use and occupa-

CHAP. V. PRECAUTIONARY MEASURES. mises be of less value than the rent, and the executor has pleaded specially as above, then he must in evidence show that he offered to surrender the premises to the plaintiff, for if he have entered or adopted the term, he is then liable so long as he *retains* possession. (*m*) But it seems clear that although an executor has taken to a lease or tenancy, yet if the profits of the land are of less amount than the rent, and there is a deficiency of assets, he may at any time waive the lease, although he have retained it for some time, and although he is bound to pay so long as the assets hold out, and then he may waive the possession and pay rent to that time, and immediately give notice of his abandonment to the reversioner and that he has no assets. (*n*) But whatever profits an executor at any time derives from demised premises after the death of his testator, he must apply specifically in the payment of rent and fulfilment of covenants, and not in payment of any debt even of an higher nature. (*o*) If he has so applied the same, he will then be free from personal liability upon proper pleading; and therefore in an action for use and occupation, where it appeared that the defendant, who was administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet it having been proved by the defendant under the *general issue* that the premises had been productive of no profit to him, and that eight months after the death of the intestate he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action. (*p*) It should seem, therefore, that so long as an executor has any assets he should reserve them, so as to enable him to pay rent during the term, and that if he discover that he have not assets to cover such continuing liability, and have for a time entered or acted under a lease, he must pay rent and give notice to the landlord of the fact, and tender the draft of a written surrender, and immediately after send the key and quit possession. (*q*)

8. *Debts*, or *Unliquidated Demands*, secured by *bond* or *covenant under seal*, and though payable at a future day, are to be preferred, and assets retained to cover them in preference to a

tion in his own time, he shall be liable *de bonis propriis*, though it be laid in the declaration that the defendant occupied *as executor*.

(*m*) *Remnant* v. *Brembridge*, 8 Taunt. 191; 2 J. B. Moore, 94, S. C.

(*n*) Toller, 6 ed. 281; Went. Off. Ex. c. 11, p. 244; *Wilkinson* v. *Cawood*, 3 Anstr. 909; 2 Williams, 1079.

(*o*) *Lyddall* v. *Dunlapp*, 1 Wils. 4; *Wilson* v. *Wigg*, 10 East, 315; 2 Williams, 1079.

(*p*) *Remnant* v. *Bremridge*, 8 Taunt. 191.

(*q*) Id. ibid.; 2 Williams, 1078, 1079.

present simple contract debt. (r) But if there be two specialties, one already payable and the other not yet due, the former must be preferred. (s) But to entitle the debt to priority as a specialty, the very contract to pay it must have been under seal, and a mere recital of the existence of such debt in a deed will not constitute a specialty. (t) If an *indemnity security* be payable absolutely on a certain day, then funds to satisfy it must be retained, although the surety has not yet in reality been prejudiced. (u)

Contingent specialty securities, such as bonds to save harmless, are not to stand in the way of debts of inferior degree, unless already forfeited; (x) and therefore before breach of the contingent condition or covenant an executor may and ought to pay even a simple contract claim. (y)

But if the contingency has taken place, then, although the damages be unliquidated and secured only by a covenant and not by a penalty, the executor must reserve adequate assets before he pays simple contract claims, and the executor may plead the *penalty* of such a bond against a simple contract action. (z)

But though a bond of a married woman is valid in equity as against her separate estate, it is not recognized at law as a specialty, so as to be entitled to priority to or pleadable against simple contract debts in the administration of assets. (a)

And voluntary bonds are to be postponed to simple contract debts, but must be paid by an executor in preference to legacies. (b)

And if a surety pay a bond debt to the obligee either in the life-time of the principal or after his death, such surety is merely a simple contract creditor; and it makes no difference although the obligee assign the bond to the surety, for the action must be brought in the name of the obligee, and the payment to him by the surety will be a good plea to answer the bond. (c) The proper course in such case is for the surety to get a *third* person to buy the bond, so as not to satisfy it as a payment but only as a *purchase*.

(r) *Woodsham* v. *Fulmerstone*, 1 Leonard, 187; *Buckland* v. *Brook*, Cro. Eliz. 315.

(s) 1 Rol. Ab. 927; 2 Williams, 672.

(t) *Lacam* v. *Mertins*, 1 Ves. sen. 316.

(u) *Goldsmith* v. *Sidnor*, 1 Rol. Ab. 925, tit. Executors; Cro. Car. 362, S. C.

(x) *Harrison's case*, 5 Coke, 28, b; *Cox* v. *Joseph*, 5 Term R. 307; Toller, 284.

(y) *Eeles* v. *Lambert*, Aleyn, 4; Toller, 282, 283.

(z) *Cox* v. *Joseph*, 5 T. R. 307; *Mussen* v. *May*, 3 Ves. & B. 194; *Davis* v. *Blackwell*, 9 Bing. 5.

(a) *Anonymous*, 18 Ves. 258; 2 Williams, 669.

(b) *Jones* v. *Powell*, 1 Eq. Cas. 94; *Lady Cox's case*, 3 P. Wms. 339; 2 Williams, 668.

(c) *Gammer* v. *Stone*, 1 Ves. sen. 339; *Woffington* v. *Sparkes*, 2 Ves. sen. 569; 2 Williams, 668.

9. *Simple contract debts.*—Of these, simple contract debts to the *King* are first to be paid, (*d*) next servants' and labourers' wages; (*e*) and it has been held that in London a simple contract debt to a citizen must be preferred, but that supposition is doubtful. (*f*) As to other simple contract debts, the executor or administrator must be certain that the debt was due from the *deceased* and not incurred *afterwards*, though in ignorance of the death. (*g*) If he be certain that the assets are or will be sufficient to pay all judgment and specialty debts and other debts entitled to preference, he may pay simple contract creditors in the first instance, but then it is at his peril; (*h*) and he may in that case pay simple contract debts *not* bearing interest before specialty creditor's debt that do bear interest, if not objected to by the latter, and legatees cannot complain with effect though an increase of interest is thereby subtracted from the fund that would otherwise come to them. (*i*) If the executor or administrator be certain that he has sufficient assets to pay all judgments and all rent and specialty debts of which he is apprized, he may then at any time before action commenced or decree to administer equally, pay any simple contract creditor he prefers, although he leave nothing for other simple contract creditors; and as an executor having assets in hand would not be allowed out of the assets his costs of defending an action for a simple contract debt, merely on the supposition that debts of a higher nature *might* appear, it seems that if he *bonâ fide* pay such a debt *without* collusion, though shortly after the death, he will be protected in so doing.

But before any executor or administrator pays any simple contract debt, he should, in the presence of one or more competent witnesses, (so as to be secure of evidence of the fact,) retain a respectable and responsible attorney to *search* in all the *superior* courts for judgments that may have been docketed; and he should also immediately *advertise* for all judgments of *inferior courts*, and for all outstanding bond and other creditors to send in their claims; (*k*) and he should not with unnecessary haste pay simple contract creditors; though it seems that unless an executor actually have knowledge of a bond or other specialty, though *not formal notice thereof*, he may pay simple contract creditors really to avoid the costs of a threatened action, (*l*) or even pay the same without such formal notice

(*d*) Bac. Ab. Executors, L. 2.
(*e*) 2 Bla. Com. 511; Toller, 266; 2 Williams, 674.
(*f*) 2 Williams, 674.
(*g*) *Blades* v. *Free*, 9 Bar. & Cres. 167.
(*h*) *Turner* v. *Turner*, 1 Jac. & W. 39.
(*i*) Id. ibid.
(*k*) *Ante*, 521; *Davis* v. *Blackwell*, 9 Bing. 9.
(*l*) Toller, 292; *Brooking* v. *Jenning*, 1 Mod. 175; *Harrison* v. *Harrison*, 3 Mod. 115; 2 Williams, 678, 679.

pending an action at the suit of a simple contract creditor, and may legally plead such payment *pending* the action; and this although the defendant be an *executor de son tort.* (m) But a *precipitate* payment of a simple contract debt might, in case a specialty should afterwards appear as well as an insufficiency of assets, afford evidence of fraud. (n) If a simple contract creditor *bonâ fide* threaten to sue, then the executor may safely pay him, provided there be no outstanding judgment, and that he have no knowledge of specialty, and this although the claim of the simple contract creditor and the payment be very shortly after the death, (o) though it seems to have been considered safer to suffer judgment by default; and if a specialty creditor should afterwards sue him, he may plead *plene administravit* before notice of the specialty or the judgment outstanding, for the law does not compel any simple contract creditor to wait any definite time, (though a *legatee* must wait a year,) and he may sue at any instant after the death, and the executor would have no defence unless he had actual knowledge of an outstanding specialty. (o) It has even been supposed that an executor must have notice of a specialty by suit thereon, and that otherwise he may pay a simple contract debt in preference, (p) but that doctrine is erroneous, and *any* knowledge of a higher outstanding debt is compulsory on the executor to plead it, so as to prevent the simple contract creditor obtaining a judgment otherwise than after satisfaction of *that debt.* (q)

21. Of executor's power to give a preference to a particular creditor in equal degree.

21. *Of giving a Preference.*—It has long been settled that amongst creditors in equal degree an executor may, even after action commenced by an adverse creditor, and at any time before judgment therein, confess a judgment, and give a preference to any other favoured creditor in the same or an higher degree, thereby postponing the party first suing; and unless assets should afterwards come to hand sufficient to pay both, the first suitor will be totally deprived of the benefit of his prior action, and this although it be done for the express purpose of depriving the plaintiff of the debt. (r) Nor will a Court of

(m) *Oxenham* v. *Clapp*, 2 Bar. & Adolp. 309, 312.
(n) Toller, 192; 2 Williams, 676, note (d); and *Davis* v. *Blackwell*, 9 Bingh. 5.
(o) 2 Williams, 677; *Davies* v. *Monkhouse*, Fitzg. 76; Bul. N. P. 178; *Sawyer* v. *Mercer*, 1 Term Rep. 690.
(p) *Brooking* v. *Jenning*, 1 Mod. 175.
(q) Toller, 292; 2 Williams, 678, 679.
(r) *Bryant* v. *Perring*, 5 Bing. 414; *Blundwell* v. *Loverdell*, 1 Sid. 21; *Edgcumb* v. *Dee*, Vaughn 95; 1 Saund. 333, a, note 8; 2 Saund. 49, 50; *Prince* v. *Nicholson*, 5 Taunt. 665; 1 Marsh. 280, S. C.; *Lyttleton* v. *Cross*, 3 Bar. & Cres. 216; and the rule is the same *in equity* at any time *before decree*, *Maltby* v. *Russell*, 2 Sim. & Stu. 227, 228.

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equity interpose to prevent this preference, excepting *after a decree* upon a bill filed, as presently noticed; (*s*) and if an executor has pleaded to a prior action *plene administravit præter* a named sum, and then another action be brought, he may and ought to plead to the latter, before the former has obtained judgment, that he has so pleaded to the former action, and has confessed judgment to that extent, and that he has no assets ultra. (*t*) Nor is it necessary that process should be taken out by the creditor to whom judgment is confessed, and the executor may at once execute a warrant of attorney to confess a judgment to a particular creditor for the precise sum due to such particular creditor, and judgment may be immediately signed thereon, (*u*) and he may give a cognovit, which would have the same effect; (*x*) and after pleading the general issue to the first suit, the executor may confess a judgment to another creditor, and plead it *puis darrein continuance*, (*y*) and this although under an order to plead *issuably*. (*z*) But a warrant of attorney or cognovit must be confined to the debt of a particular creditor, and cannot be given to one creditor as a trustee for several, so as to be effectually pleaded to an adverse suit of an omitted creditor, or one who has not concurred in such security. (*a*) Nor can an executor, after action commenced, *pay* another creditor in *equal* degree, without first confessing a judgment in his favour, (*b*) though such a *payment* would be legal and effective pending a suit in *equity* for an account and distribution. (*c*) A *payment* even of a *higher* security, pending an action, should be pleaded specially. (*d*) But at *law*, when an executor or administrator is obliged to apply for time to plead, or other favour, the Court will in general impose terms to prevent such unjust proceeding; and the power to give a preference is confined to *debts* in equal degree, and does not extend to *legacies*, and an executor cannot retain for a general legacy to himself in preference to other legatees, but must, in case of deficiency of assets to pay the whole, abate equally with the other legatees. (*e*)

(*s*) *Maltby* v. *Russell*, 2 Sim. & Stu. 227, 228; *Waring* v. *Danvers*, 1 Peere Williams, 295; 2 Saund. 51, note 3.

(*t*) *Waters* v. *Ogden*, Doug. 452, 3 ed., and see 1 Saund. 333, b., note 8.

(*u*) *Mackreth* v. *Jackson*, 1 Maule & S. 408.

(*x*) *Davis* v. *Hughes*, 7 T. R. 206.

(*y*) *Prince* v. *Nicholson*, 5 Taunt. 665; 1 Marsh. 280, S. C.

(*z*) *Bryant* v. *Perring*, 5 Bing. 414.

(*a*) *Tolputt* v. *Wells*, 1 M. & S. 395; notwithstanding the dictum of Lawrence, J. in *Meux* v. *Howell*, 4 East, 9; 1 Saund. 333, b. note (*e*.)

(*b*) 1 Saund. 333, note 8, *semble Oxenham* v. *Clapp*. 2 B. & Adolph. 313, 314.

(*c*) *Maltby* v. *Russell*, 2 Sim. & Stu. 227.

(*d*) See form and law, *Oxenham* v. *Clapp*. 2 Bar. & Adolph. 309, 314.

(*e*) Toller, 6 ed. 347; *post*.

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22. Of controlling such power in equity.

22. *Of controlling such Power.*—But a Court of Equity will (to a certain extent, though not adequately,) by a decree controul and prevent the preference, upon bill filed by any creditor on behalf of himself *and all others* against the executor or administrator, requiring him to account and distribute equally, upon which a proper division and distribution will be decreed, and this is considered in the nature of a judgment in favour of all the creditors; (*f*) and although by such a decree the *legal* priorities of creditors, according to the *degree* in which their debts stand, are not affected, yet the power of *preference* is taken away, and suits of this kind have now become the usual and proper means of compelling an equal distribution of assets amongst the creditors of a deceased insolvent. (*g*) When an executor or administrator is pressed by numerous creditors before he has assets to pay all, it is advisable for him to get a friendly creditor to institute such a suit, so as to prevent an accumulation of litigation and costs. And an executor himself, and without the interference of any creditor, may, it seems, if he be desirous to apply the assets as far as they would go in satisfying the debts equally, may file a bill against all the creditors, that they may, if they please, contest each other's debts, and that their preference may be settled, and such a bill, on demurrer, was held proper. (*h*)

If it be doubtful whether there be assets more than sufficient to pay judgments and specialty debts, then a *simple contract* creditor should not file such a bill, or at least if he do, he might not be allowed his costs out of the assets, though a specialty creditor might appear and avail himself of the benefit of the proceeding. (*i*) It is the duty of the executor as far as possible to facilitate the obtaining a decree under which the estate may be protected from actions by his putting in his answer speedily; (*k*) and he will then be allowed his costs out of the assets. (*l*)

But, as already suggested, the controlling power of a court of equity is not perfect nor adequate, for pending suit, and at any time *before actual decree*, an executor may voluntarily pay or confess a judgment in favour of a particular creditor, though

(*f*) See cases, 2 Williams, 681.

(*g*) See the observations of Sir J. Mansfield, in *Brady* v. *Sheil*, 1 Campb. 148; *Nunn* v. *Barlow*, 1 Sim. & Stu. 588; 2 Williams, 682, 683.

(*h*) *Buccle* v. *Asleo*, 2 Vern. 37.

(*i*) *Young* v. *Everest*, 1 Russ. & M. 426; *Rowlands* v. *Tucker*, Id. 665; and see *Johnson* v. *Compton*, 1 Clark & Fin. 47.

(*k*) *Clark* v. *Earl Ormond*, 1 Jacob, 108.

(*l*) *Young* v. *Everest*, 1 Russ. & M. 426; *Leekmere* v. *Brazier*, 1 Russ. 72.

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after decree it would be too late to do so. (*m*) Though, according to the principle that equality is equity, the propriety of the rule has been questioned. (*n*) Immediately after decree to administer the assets equally, the executor should give notice to each creditor who has any pending action against him. (*o*) After decree in such suit, all the creditors *must* come in, and though at law an adverse creditor may proceed until decree, yet if by so doing he should, after notice of decree, obtain a priority by judgment and execution, a Court of Equity might compel him to refund what he may have thereby levied, (*p*) and although a creditor may have obtained judgment at law before the decree, he cannot afterwards take out execution. (*p*) It seems, however, that such creditor is entitled to his costs at law up to the time of notice of the decree. (*q*) It would seem more just if executors were wholly prevented from at any time giving a preference to a favoured creditor or legatee to the injury of others. (*r*) If, however, a creditor should so proceed, it is the duty of an executor to make a short affidavit of the state of the assets, and to move the Court of Equity to restrain him, or the executor may be personally responsible. (*s*) And any creditor may also make such motion; (*t*) and it seems that *an injunction against a creditor's proceeding at law may now be obtained without filing a bill.* (*u*) From the report of *Lord* v. *Wormleighton*, it appears that upon such a friendly bill being filed and duly expedited, a decree may be obtained in a very few days, (*x*) but an injunction will only be granted upon affidavit of the state of the assets and upon payment of costs at law, and in which must even be included the costs of a trial at law after notice of the decree;

(*m*) *Darston* v. *Lord Orford*, Prec. Ch. 180; Toller, 229; *Parker* v. *Dee*, 2 Chan. C. 200; *Drewry* v. *Thacker*, 3 Swanst. 529; *Maltby* v. *Russell*, 2 Sim. & Stu. 227; 2 Williams, 683, *sed quære*, id. 684, note (*p*).

(*n*) *Per* the Vice Chancellor in *Maltby* v. *Russell*, 2 Sim. & Stu. 227, 228. *Inter vivos* a debtor may unquestionably, independently of the bankrupt laws, give a preference at any instant before execution to another creditor, *Holbird* v. *Anderson*, 5 Term Rep. 235; *Pickstock* v. *Lyster*, 3 Maule & S. 371; but then he still leaves the creditor the right to proceed against *his person*, and take him in execution. But it seems unjust that an executor or administrator, who is a mere *trustee* for creditors and legatees, should ever be allowed, at least in equity, to give a preference to a relation or other creditor, thereby taking every remedy from the neglected or adverse creditor, who has no remedy against the person of his debtor. The power to give a preference seems to require further restraint. But see that an injunction may be obtained *Clark* v. *Lord Ormond*, Jacob, 124, 125, *infra*.

(*o*) *Clark* v. *Earl Ormond*, 1 Jacob, 122.

(*p*) Id. ibid. 122 to 125.

(*q*) Id. ibid. 124.

(*r*) *Supra*, note (*n*).

(*s*) *Clark* v. *Earl of Ormond*, Jacob, 122 to 125.

(*t*) *Lord* v. *Wormleighton*, Jacob, 148.

(*u*) *Clark* v. *Earl of Ormond*, Jacob, 124, 125.

(*x*) *Lord* v. *Wormleighton*, Jacob, 148, bill filed 12th July, answer and replication on 17th July, and decree obtained on 21st July, and notice of decree served on same day.

if the executor has pleaded non-assumpsit, and the same and other pleas have been found against the executor. (y) But as upon a false plea of *plene administravit* an executor is only personally liable to costs, and not for the debt beyond the assets found, the creditor must come in under the decree for his debt. (z)

Before paying any legacy, an executor should reserve funds to answer future demands that may arise under *any legal contract*, of which he has knowledge. (a)

With respect to dilapidations, which the executors of a deceased incumbent are liable at common law and by the ecclesiastical law to make good. (b) The books appear to be silent as to the degree in which a claim of this nature upon the assets shall stand. (c) It should seem that the claim ranks in equal degree or next to simple contract debts, and should at all events be satisfied before legacies. (d) — Dilapidation by an ecclesiastical person.

In equity, where a tenant for life has been guilty of equitable waste, a bill may be filed against his executors to compel satisfaction out of the assets, and such a claim will, it seems, be preferred to legacies, though not to simple contract debts. (e) An executor, therefore, having notice of such a claim, or at least after bill filed, should not pay legacies.

23. The *Legacy Duties* payable under the *English* act, 55 Geo. 3, c. 184, and the *Irish* act, 56 Geo. 3, c. 56, (and regulated by the prior acts, and *inter alia* by 36 Geo. 3, c. 52, as to stamped receipts on legacies, and 46 Geo. 3, c. 52, s. 6,) are to be paid before, and deducted out of the assets, before payment of legacies or division of the residue; and if not paid they become the personal debt of the executor or administrator, as well as of the legatee; and if the executor pay the legacy, without retaining the amount of duty, he may, after paying the duty, recover the amount from the legatee; (*f*) and the legacy duty — 23. Legacy duty.

(y) *Ante*, 546, n. (x); *Fielden* v. *Fielden*, 1 Sim. & Stu. 255, and as to costs, *post*, 557.

(z) Id. ibid. 255; *Lord* v. *Wormleighton*, Jacob, 150.

(a) *Johnson* v. *Mills*, 1 Ves. 282.

(b) *Ante*, 393; *Wise* v. *Metcalfe*, 10 B. & Cres. 299—308.

(c) See the cases in general, *Sollers* v. *Lawrence*, Willes, 421; 3 Woodes, 265; *Radcliffe* v. *D'Oyley*, 2 T. R. 636; Watson's Cl. Law, chap. xxxix.; Vin. Ab. Dilapi. 15; 2 Burn's Ecc. L. 146, 153; *Jones* v. *Hill*, 3 Lev. 268; *Salkard* v. *Beckwith*, 1 Lutw. 116, and 2 Chit. Pl. 785, 786, 5 ed.

(d) The late Mr. Serjt. Hill gave an opinion to that effect. The personal representative is clearly not liable without assets, Gibs. 753; *Carter* v. *Pecke*, 3 Keb. 619; Lil. Ent. 21, 67, 68.

(e) *Landsdown* v. *Landsdown*, 1 Madd. Rep. 116; 1 Jac. & Walk. 522; 1 Chit. Eq. Dig. 375; Id. Waste, 1345, Account.

(*f*) *Hales* v. *F[illegible]an*, 1 Brod. & Bing. 391; 4 Moore, 21, S. C. See the cases on the Stamp Acts, Williams' Exec.; Chit. Col. Stat. tit. Stamps, 1017 to 1020; Id. on Stamp Acts, 227 to 231; *Hill* v. *Atkinson*, 2 Meriv. 45; 3 Price, 404, S. C.; *Attorney-General* v. *Wood*, 2 Young & J. 290

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24. Payment of legacies. (*i*) 24. *Payment of Legacies.*—With respect to *legacies* we have seen, that when *specific*, whether of a chattel personal or real, it is the duty of the executor, as far as possible, to preserve them *entire*, such as heir looms, according to the testator's wish, and unless compelled by suit, he ought not to apply them to the payment of debts; (*k*) and where the legatee of a specific bequest of wine, which was reported before the death, but the entry was not made till after that event, it was held that the legatee was not subject to the payment of the duties, but that the executor was bound to pay the same out of the general assets. (*l*) A specific bequest, or rather devise, of land, as a legacy, is not bound to contribute, in case of deficiency of assets, to pay legacies, (*m*) nor are specific legacies in general to be abated from, unless in favour of creditors. (*n*)

An executor should cautiously withhold his *assent* to the bequest, by any, even *very slight*, expression of congratulation or approbation, (*o*) until he be confident that the other assets will certainly be sufficient to pay every expense and all debts; and in cases of the least doubt, he will not be safe in assenting to the bequest until a year has elapsed; (*p*) for if he assent to a bequest of a term, he thereby vests the legal interest in the legatee, who might afterwards maintain ejectment against him, should possession be withheld; (*q*) but before assent, the legatee could not legally withhold the chattel specifically bequeathed from the executor. (*r*) If an executor should incautiously

(*g*) See 55 Geo. 3, c. 184, *ante*, 547; 36 Geo. 3, c. 52, s. 7. A note given to evade the legacy duty would be void, *Holliday* v. *Atkinson*, 5 B. & Cres. 501.

(*h*) *Attorney-General* v. *Holbrook*, 3 Young & J. 114.

(*i*) See in general, the cases fully collected and arranged, 1 Chit. Eq. Dig. tit. Legacies.

(*k*) *Clark* v. *Earl Ormond*, Jacob, 108.

(*l*) *Stewart* v. *Denton*, 2 Chitty's Rep. 456.

(*m*) *Spong* v. *Spong*, 1 Dow. Rep. New S. 365.

(*n*) *Clifton* v. *Burt*, 1 P. Wms. 679; Toller, 339, 344.

(*o*) *Doe dem. Hayes* v. *Sturges*, 7 Taunt. 217; *Doe dem. Sturges* v. *Tatchell*, 3 Bar. & Adolp. 673; Toller, 6 ed. 308, 309; Com. Dig Administration, C. 6; Shep. Touch. 456.

(*p*) *Davis* v. *Blackwell*, 9 Bing. 5. Assent to a bequest of stock is essential, *Franklin* v. *Bank of England*, 9 Bar. & Cres. 156.

(*q*) *Doe dem. Lord Saye and Sele* v. *Guye*, 3 East, 120; 4 Esp. R. 154, S. C. What not an assent, *Doe dem. Hayes* v. *Sturges*, 7 Taunt. 217; 2 Marsh. 505, S. C.

(*r*) Toller, 6 ed. 307.

assent, and a deficiency of assets to pay debts should afterwards appear, he might be thereby subjected to pay debts to the extent of the value of the lease, or other specific bequest, out of his own assets; but until assent, *no legal property* vests in the legatee.(*s*) What amounts to *an assent* to a specific bequest or general legacy, is in general a question of *fact*, though decided cases upon particular expressions have gone far to settle the rule. (*t*)

One general rule is, that where a party has two titles under a will, the one as executor, the other as legatee, some clear and specific act must be done to show that he elects to take in the latter character; "some circumstance is necessary to show whether the executor will assent to the legacy or refuse it," and in default of such evidence, the party will be presumed to take as executor only. (*u*)

In a late case, containing most of the authorities relating to assents to legacies, the testator bequeathed a term in premises to *S.* his executors, &c. in trust to sell and dispose of the same as might seem most advantageous, and to apply the proceeds to the maintenance of testator's son during his life; and he bequeathed the remainder, after the son's decease, to such uses as the son should by will appoint, and he appointed *S.* his executor; and when the testator died, his journeyman was managing his business on the premises, as he had done for some years, and the testator's son also resided there. And at the funeral, *S.* said, in the presence of the journeyman and other persons, "*the house is young B.'s*" (meaning the son's); "*T.* (the journeyman) must stay in the house and go on with the business, *but young B. must have a biding place.*" And *T.* accordingly continued on the premises, carrying on the business, paying no rent, but maintaining the testator's son, who was weak in intellect and unable to provide for himself, and *S.* lived twenty years afterwards, and did not interfere further with the property: it was held, that this was sufficient evidence of a *disposal* of the property by *S.* according to the trusts in the will, and that he had *assented* to take under the will *as legatee in trust*, and not *as executor*. (*x*)

An executor may, when he is certain that there are abundant assets to pay all known debts, and that there are no other debts outstanding, pay all legacies, and even hand over the residue

(*s*) 1 Saund. 279, d., notes, and Id. note (*a*).

(*t*) See the leading cases, *Doe dem. Hayes* v. *Sturges*, 7 Taunt. 217; *Doe dem. Sturges* v. *Tatchell*, 3 B. & Adolp. 675, and *infra*, n. (*x*).

(*u*) *Welcden* v. *Elkington*, Plowd. 520.

(*x*) *Doe dem. Sturges* v. *Tatchell*, 3 Bar. & Adolp. 675.

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within a year after the death, but this would be at his peril; (*y*) and if he invest the residue in the funds, bearing interest, legatees, or the party entitled to the residue, may be entitled to such interest even from the death. (*z*) But *in general, legacies ought not to be paid within a year after the death*, and not even then without an indemnity, if there be the least reason to apprehend that there are debts or claims outstanding, even for damages for breach of covenant. (*a*) This year is allowed for the payment of legacies with analogy to the statute of distribution, in order that the executor may have full opportunity to obtain information of the state of the property, (*b*) and within that period, an executor cannot be compelled to pay a legacy, even in a case where the testator directed it to be discharged within six months after his death. (*c*) But if the assets clearly appear more than sufficient to pay debts, then the executor *may* (without the right of creditors or other legatees to complain) pay at any time, even within the year. (*d*) But no payment of a legacy within a year should be made, unless upon adequate indemnity, which may always be required from the legatee. And where an executor paid a legacy six months after probate, it was held that such payment could not be pleaded to an action brought two years after the death, on a covenant to repair a house which the testator never occupied, and of the state of which the executor had no notice at the time of his payment. (*e*) If an executor do not pay legacies at the end of a year, and have assets, he will be liable after that time to pay interest, (*f*) and sometimes even compound interest, (*g*) and if he should attempt to impose improper terms, as a condition upon performance of which only he will pay, he will in equity be personally liable to pay the costs of a bill to enforce payment, or at least the costs will fall upon the residue to which he may be entitled. (*h*)

In general no action at law lies for a legacy, unless upon an express promise in consideration of forbearance, (*i*) or where the amount of the legacy has been treated by the executor as

(*y*) *Angerstein* v. *Martin*, 1 Turner & Russ. 241.

(*z*) Id. ibid.; *Hewitt* v. *Morris*, Id. 241.

(*a*) *Davis* v. *Blackwell*, 9 Bing. 5.

(*b*) 22 & 23 Car. 2, c. 10, s. 8, which enacts "that no distribution of the goods of any person dying intestate be made till *after one year* after the intestate's death;" *Wood* v. *Penoyre*, 13 Ves. 333; *Pearson* v. *Pearson*, 1 Schol. & Lef. 11.

(*c*) *Benson* v. *Maude*, 6 Madd. 15; *Brooks* v. *Lewis*, 6 Madd. 358.

(*d*) *Supra*, *Angerstein* v. *Martin*, 1 Turn. & Russ. 241; *Garthshore* v. *Chalie*, 10 Ves. 13; see further 2 Williams, 851 to 864.

(*e*) *Davis* v. *Blackwell*, 9 Bingham, 5; *Wilkins* v. *Pry*, 1 Meriv. 265; and see Toller, 6 ed. 322.

(*f*) *Pearson* v. *Pearson*, 1 Scho. & Lef. 10; 2 Williams, 8[illegible], 883; 2 Sim. & Stu. 396.

(*g*) 2 Williams, 883.

(*h*) *Waller* v. *Paley*, 1 Russ. R. 375; *ante*, 439, note (*i*).

(*i*) *Ante*, 112; 2 Williams, 1186, 1187, 1188, 1093; *Jones* v. *Tanner*, 7 Bar. & Cres. 54, 542.

lent to him by the legatee, (*k*) or where the executor has *assented* to a specific bequest. (*l*) In general a *suit in equity* or in the Ecclesiastical Court is necessary. (*m*)

The consideration of the persons to *whom* a legacy may be *paid*, and when it may be to the husband, or when the wife may interpose her claim and secure a provision, will be hereafter considered. (*n*)

It had been doubted whether an executor could insist on having a *stamped receipt* in payment of a legacy; (*o*) but now it seems clear that he is bound, and therefore *entitled* to have a receipt for the same, properly stamped according to the value of the legacy, and the relationship of the parties; (*p*) though, if the testator directed the legacies to be paid without deduction, then the legatees are entitled to the full amount, and the legacy duty must be paid by the executors out of the general assets. (*q*)

Of securing the payment of Legacies and Residue.

Security for the specific delivery or payment of a *specific bequest* or *legacy* may, in cases of doubtful solvency of the executor, be enforced by injunction. (*r*) And residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, although collusion between them is neither charged nor proved. (*s*) So where an annuity has been charged upon real estate, and afterwards devised to the executor in fee, and a policy of insurance upon the estate had been kept on foot out of the personalty, and the estate was destroyed by fire, a bill filed by the annuitant to prevent the executor from receiving the insurance money was sustained. (*t*) With respect to the *costs* of a suit in equity for a legacy, it has been held, that if a trustee refuse to pay a legacy without the direction of the Court, in a case which admitted of no doubt, he will not be allowed his costs out of the estate, and must himself bear them, but that he will not be made to pay the other party's costs of the suit, because he might have acted from ignorance, and not from any improper motive. (*u*) But we have seen, that if an executor *perversely*

(*k*) *Gregory* v. *Harman*, 1 Moore & P. 209.

(*l*) *Doe dem. Lord Saye and Sele* v. *Guye*, 3 East, 120.

(*m*) *Philpott's case*, 1 Rol. Ab. 919, F.; 2 Williams, 1266, 1270.

(*n*) See *ante*, 61. The distinctions are exceedingly fine; see *Pritchard* v. *Amos*, 1 Turner & Russ. 222; *Tyler* v. *Lake*, 1 Clark & Fin. 144; *semble*, over-ruling *Hartley* v. *Hurle*, 5 Ves. 540; and see 2 Williams, 864 to 876.

(*o*) *Green* v. *Croft*, 2 Hen. Bla. 30.

(*p*) 36 Geo. 3, c. 52, s. 27; Toller, 329. The 28th section subjects an executor to a penalty for neglecting to take such a stamped receipt.

(*q*) *Barksdale* v. *Gilliat*, 1 Swanst. 562; *Waring* v. *Ward*, 5 Ves. 670; Toller, 329.

(*r*) *Bowsher* v. *Watkins*, 1 Russ. & M. 277; see *post*, chap. viii.

(*s*) *Bowsher* v. *Watkins*, 1 Russ. & M. 277.

(*t*) *Parry* v. *Ashley*, 3 Simon's Rep. 97.

(*u*) *Knight* v. *Martin*, 1 Russ. & 70.

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refuse payment of a legacy, unless something be done by the legatee which he is not bound to perform, he will then be personally liable to pay costs of the proceeding against him in equity. (*x*) We have seen that no action at law lies for a *distributive* share, even upon an express promise, (*y*) unless it has been treated as lent, or as a debt. (*z*)

Proceedings on administration bond, when.

To enable a legatee or party entitled to a residue to sue on the *administration bond*, it has been recently held at law (contrary to the doctrine in the Ecclesiastical and Spiritual Courts) that there must have been a *decree* in the latter court. (*a*) When, however such bond has been forfeited, a creditor, as well as the next of kin, is entitled to sue upon the same in the name of the archbishop or his ordinary, and they cannot refuse. (*b*)

No retainer, priority, or preference amongst legatees.

An executor cannot give himself or any other legatee (except in the case of specific legacies) *any preference* over other legatees, as he may in case of *debts*, nor can he retain so as to pay himself; (*c*) and in case of insufficiency of assets to pay the whole, all general legatees are to abate alike and in proportion to the amount of their respective legacies; (*d*) and no particular *legatee* can be preferred by an executor, he not having any power in that respect as in the case of *debts* in equal degree; (*e*) unless there be some expression in the will, denoting the testator's intention that a particular legatee shall have priority, and which will then be given effect to. (*f*) Even if a legacy be given to an executor expressly for his *care and pains*, yet it must abate in proportion with the other legatees. (*g*),

But in general, if there would be *no residue* left for an express legatee thereof, after paying particular legacies, yet such a residuary legatee, on a deficiency of assets, has been allowed to come in *pari passu* with the other legatees, by reason of the very special circumstances of the case. (*h*)

A Court of Equity will compel a *legatee* to *refund* when the estate proves insufficient, whether security has been given by him for such purpose or not. (*i*)

(*x*) *Ante*, 439, n. (*i*).

(*y*) *Ante*, 110; *Jones* v. *Tanner*, 7 Bar. & Cres. 542.

(*z*) *Ante*, 112; *Gregory* v. *Harman*, 1 Moore & P. 209.

(*a*) *Archbishop of Canterbury* v. *Tuffen*, 8 Bar. & Cres. 150; but see *Devey* v. *Edward*, 3 Add. Ecc. Rep. 68, *contra*.

(*b*) *Canterbury, Archbp.* v. *House*, Cowp. 140; Loft, 622, S. C.; see Chit. Col. Stat. Executors.

(*c*) *Semble*, Toller, 6 ed. 347; Anon. 2 Atk. 171; *Ashley* v. *Pocock*, 3 Atk. 208.

(*d*) *Beeston* v. *Booth*, 4 Madd. 161, 168; *Clark* v. *Sewell*, 3 Atk. 99.

(*e*) *Ashley* v. *Pocock*, 3 Atk. 208.

(*f*) *Acton* v. *Acton*, 1 Meriv. 178; *Attorney General* v. *Robins*, 2 P. Williams, 23.

(*g*) *Fretwell* v. *Stacey*, 2 Vern. 434.

(*h*) *Dyose* v. *Dyose*, 1 P. Williams, 305.

(*i*) *Noel* v. *Robinson*, 1 Vern. 93; *Hawkins* v. *Day*, Ambl. 162; Toller, 6 ed. 322; when not, Toller, 341

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25. Remuneration to executors or administrators for trouble,

25. *Of Remuneration for Trouble, &c.*—In case of a will of personal property in this country an executor is not entitled to any remuneration for his own personal trouble or loss of time, unless expressly bequeathed and directed, and on which account it is that the law gives to the executor the whole undisposed-of residue, unless by some expression, to be collected from the will, as by a bequest to the executor for his trouble, a contrary intention on the part of the testator is to be collected.(*k*) A liberal testator ought at least *expressly* to direct that the executor shall be paid his expenses and for his trouble, loss of time, and interest on any money advanced, besides any legacy he may think fit to give, unless the latter be so considerable as certainly to more than cover reasonable remuneration. An executor *in India* is entitled to a commission of five per cent. on all assets of a testator collected by him *there*, including the assets he retains in respect of a legacy to himself, *not given* to him in the character of executor, and including monies belonging to the testator, which were in the hands of a commercial house in which the executor was, and that testator had a partner.(*l*) An executor with an annuity would be allowed expenses of collection of rents,(*m*) and an executor has been allowed the expense of an accountant under circumstances,(*n*) and also the costs of a solicitor's assistance.(*o*) But not his expenses of carrying on the trade as surviving partner and executor.(*p*)

But an executor is not allowed interest on his advances for costs, but only from the time of the balance having been struck upon the general report;(*q*) nor is he ever allowed, in the absence of express bequest, any compensation for time and trouble, especially where there is an express legacy for his pains, &c. however inadequate;(*r*) and if he renounce, but stipulate with the residuary legatee to act as executor for a certain sum for his trouble, if he die before he has completed the trusts, he will not be entitled to any part.(*r*) If however an executor borrow or advance his own money to pay importunate creditors, he is entitled to interest on his advances.(*s*)

(*k*) *Ante*, 531 In *Whittaker* v. *Tatham*, 7 Bing. 628, it was held that parol evidence of declarations in favour of giving the residue to the executor cannot be received where the will contains a specific bequest to the executor.

(*l*) *Cockerell* v. *Barber*, 1 Simon's Rep. 23; *Chetham* v. *Lord Audley*, 4 Ves. 72. But see *Freeman* v. *Fairlie*, 3 Meriv. 24.

(*m*) *Wilkinson* v. *Wilkinson*, 2 Sim. & Stu. 237.

(*n*) *Henderson* v. *M'Iver*, 3 Mad. 275.

(*o*) *Macknamara* v. *Jones*, Dick. 587.

(*p*) *Burden* v. *Burden*, 1 Ves. & B. 170.

(*q*) *Gordon* v. *Trail*, 8 Price's R. 416.

(*r*) *Robinson* v. *Pitt*, 3 P. Wms. 249.

(*s*) *Small* v. *Wing*, 3 Bro. P. C. 66.

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26. Of distribution or payment of the residue.

26. *Of the Residue.*—As to the *residue*, the statute of distribution, 22 & 23 Car. 2, c. 10, s. 8, in case of *intestacy*, directs that no distribution shall be made till after one year, and that even then the persons receiving their distributive shares shall give bond to refund in case debts should appear. (*t*) But if the executor or administrator detain the residue after the expiration of a year without reasonable grounds, it should seem that he will be liable to pay interest. (*u*) An executor is entitled to the residue undisposed of by the will, for his trouble, unless there be expressions in the will which denote a contrary intention, as a bequest to him of a reversionary interest in personalty; but parol evidence is admissible to rebut that presumption. (*x*) On the other hand, it has been held that parol evidence of declarations in favour of giving the residue to the executor cannot be received when the will contains a specific bequest to the executor, because such parol evidence would be repugnant to the written terms of the will. (*y*) If an executor admit that all the testator's debts and funeral expenses have been paid, the Court of Equity will on motion order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue. (*z*)

The remedy for the *residue* is in Equity or in the Ecclesiastical Court, (*a*) unless charged on land or payable out of *freehold* interest in lands devised to be sold, or out of equitable assets, and then the suit must be in *Equity*. (*b*)

Before attempting to divide the residue amongst the supposed next of kin, it may in many cases be prudent, and in some necessary, first to advertise for the next of kin or heir, and sometimes this is expressly rendered essential under the decree of a Court of Equity. And if a debt appear at any distance of time, it must be paid in prejudice of a party entitled to the residue. (*c*) The form of the public notice may be to the effect subscribed in the notes. (*d*)

(*t*) See statute and decisions, Chit. Col. Stat. tit. "Executors," 326; see the table of distributions, *ante*, 108 to 110.

(*u*) *Kilvington* v. *Gray*, 2 Sim. & Stu. 396; *Turner* v. *Turner*, 1 Jac. & Walk. 39; *Cracklet* v. *Bethune*, Id. 586.

(*x*) *Oldman* v. *Slater*, 3 Sim. 84; *Whitaker* v. *Tatham*, 7 Bing. 628; *ante*, 352, n. (*k*).

(*y*) *Whitaker* v. *Tatham*, 7 Bing. 628.

(*z*) *Dando* v. *Dando*, 1 Simon's R. 510.

(*a*) 2 Williams, 1270.

(*b*) *Baker* v. *May*, 9 Bar. & Cres. 489.

(*c*) *Greig* v. *Somerville*, 1 Russ. & Mylne, 338.

Concise advertisement for an heir.

(*d*) HEIR-AT-LAW of J. N., Esq., who died at ——, in ——, in 1794.—Any person or persons who can give INFORMATION of such HEIR-AT-LAW to Mr. W. S. of P. aforesaid, or to Mr. W. C. of ——, London, will be REMUNERATED for their trouble by the said W. C.

The like for next of kin.

MR. J. W., deceased.—If the NEXT OF KIN of Mr. J. W., who carried on the business of an apothecary in —— Street, London, between the years 1795 and 1802, and who died intestate in or previous to 1803, will apply either personally or by letter (if the latter, the postage to be paid) to Messrs. W. and P., Solicitors, —— Street, London, they will HEAR OF SOMETHING to their ADVANTAGE.

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27. Of actions and proceedings by and against executors, and administrators.

27. Of Actions and Suits by and against Executors or Administrators, or one of several, and the Pleadings and Evidence therein.—When one of several executors alone has proved, it has in a recent case been supposed that he may sue alone in equity and need not join the other executors though they have not renounced; and in the same case it was said, that the same rule prevails at law.(*d*) But the better opinion is, that as well in equity as at law, all the executors ought to join,(*e*) or the defendant may plead in abatement or otherwise defeat the proceeding, unless those who have not proved have formally renounced in the Ecclesiastical Court. This is clearly the rule at law,(*f*) and it should seem that the same rule also should prevail in equity.(*g*)

Who to sue or be sued.

The process.

Bailable process at the suit of an executor may be special; and when the plaintiff, having sued out general process and declared specially as executrix, the Court refused to enter an exoneretur on the bail piece.(*h*)

The declaration.

Declarations by executors or administrators should not (unless the clearest evidence in support of that form of declaring can certainly be adduced) contain any count upon an account stated with or other promise supposed to have been made to *the plaintiff*, though in his representative character; because if such count be inserted, the plaintiff, though in other respects suing in his representative character, will be personally liable to pay costs in case he be nonsuited, and the judgment will be for the costs *de bonis testatoris et si non de bonis propriis*.(*i*)

The like for next of kin and heir, in pursuance of a decree.

PURSUANT to Decree of the High Court of Chancery, made in a cause wherein E. J., widow, is the plaintiff, and W. D. W. and others are the defendants, whereby it is referred to James Trower, Esq., one of the Masters of the said Court, to inquire and state to the Court who were the NEXT OF KIN and HEIR-AT-LAW of E. P. P., late of ——, in the county of ——, spinster, a minor, deceased, in the pleadings of the said cause named, living at the time of her death, (which happened on or about the 10th day of November, 1832), and whether any such next of kin are since dead, and when they respectively died, and who is or are the personal representative or representatives of such next of kin as have since died, and whether such heir-at-law is now living or deceased, and if dead who are or is heir or heirs, or new devisee or devisees, and who are his personal representatives. All persons claiming as such heir-at-law, new devisees, next of kin, or personal representatives, are, on or before the first day of April, 1833, by their solicitors, to come in before the said Master, at his chambers, in Southampton-buildings, Chancery-lane, London, to prove such heirship, kindred, or representation; or in default thereof, they will be peremptorily excluded the benefit of the said decree.

H. and G., Plaintiff's Solicitors, —— Street.

(*d*) *Davies* v. *Williams*, 1 Simon's Rep. 5, A. D. 1826; but see 2 Williams, 627, 1174.

(*e*) Bro. Executors, 83; 1 Saund. 291, n. 4; *Kilby* v. *Stanton*, 2 Young & J. 75; *Brassington* v. *Ault*, 2 Bing. 178; 2 Williams, 627, 1174; *post*, 560, n. (*p*).

(*f*) *Praed* v. *Duchess of Cumberland*, 4 T. R. 585; and see *Kilby* v. *Stanton*, 2 Young & J. 77.

(*g*) Id. and 2 Williams, 627, 1174.

(*h*) *Ashworth, executrix*, v. *Ryal*, 1 Bar. & Adolp. 19.

(*i*) *Dobbingen* v. *Harrison*, 9 Bar. & Cres. 666; *Jobson* v. *Foster*, 1 Bar. & Adolp. 6.

But on the other hand, unless the declaration contain a count on a promise to or by an executor or administrator *as such*, no promise or account stated since the death can be given in evidence, either to take the case out of the statute of limitations or otherwise. (k) The same liability to costs equally prevails, whether the declaration be upon a supposed account stated *with the plaintiff* of monies due to the testator, or of monies due to the plaintiff as executor, (k) or any other promise laid to the plaintiff in his representative character. (l) But so far as the pleadings are concerned this doctrine only applies to the costs of that count in particular which states a promise to the plaintiff. (l) The judgment as to costs against an executor is to be levied of the assets of the testator or intestate in the first instance, *et si non*, then as to the costs *de bonis propriis*.

The pleas by executors or administrators and proceedings thereon.

With respect to the pleas, when an executor or administrator is sued for a debt which may *justly* be disputed, he may and ought to plead a plea denying it, so as to prevent the creditors, or legatee, or next of kin, from being prejudiced by an unjust debt diminishing the fund. (m) But it is not compulsory on an executor to plead the statute of limitations, (n) though he may by bill in equity, at the instance of any party interested, be compelled to plead the same. (o) If at the time of pleading, the defendant has duly administered all the assets that have come to his hands, he should plead *plene administravit*, viz. "That he hath fully administered all the assets of the deceased at the time of his death, that have come to his hands as executor or administrator to be administered, (p) and that he hath not any goods and chattels which were of the deceased at the time of his death in his hands to be administered, nor had on the day of the commencement of this suit *nor ever since*, and which latter words are essential." (q)

If the plaintiff should take issue on a general or special plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando*. (r) If assets have come to hand since the commencement of the action, and remain un-

(k) *Sarell* v. *Wine*, 3 East, 409; *Ward* v. *Hunter*, 6 Taunt. 210, and *per* Parke, J. in *Jobson* v. *Forster*, 1 Bar. & Adolp. 8.

(l) *Slater* v. *Lawson*, 1 Bar. & Adolp. 893.

(m) *Ante*, 530.

(n) Id. ibid.

(o) Id. ibid.

(p) Notwithstanding the observations of Mr. Serjeant Williams, that these words are unnecessary, see 2 Saund. 220, n. it seems advisable to insert them, Id. note (a), and see *Wells* v. *Fydell*, 10 East, 315.

(q) See 2 Saund. 220, note 3; *Gewen* v. *Role*, Cro. Jac. 132; *Covel* v. *Deval*, 2 Lutw. 1637; *Noel* v. *Nelson*, 2 Saund. 216, note 1. How an executor of an executor should plead *plene administravit*, see *Wells* v. *Fydell*, 10 East, 315.

(r) 1 Rol. Ab. 929, B. pl. 2; Bro. Executor, 18; S. C. 2 Saund. 217, note 1.

administered, or if assets have come to hand *since the plea*, then the plaintiff may reply that fact specially. (*s*) But where there is any doubt whether the plea is true, the safest course is as speedily as possible to pray judgment of assets *in futuro*, that have accrued, or may accrue, at any time *after the time of pleading*, and not merely from the time of praying the judgment, (*t*) for by that means the plaintiff may afterwards proceed and have the benefit of any assets received after the time of *pleading*, and not be confined to assets received after the time of signing judgment. (*u*)

If an executor or administrator plead a plea, *all* the facts relating to which he *must know to be false*, as *ne unques executor* or *administrator*, and it be found against him, the judgment is "that the plaintiff do recover as well the *debt* as the *costs de bonis testatoris*, and if none, then of the defendant's *own goods*;" (*x*) but this does not apply to a false plea of *plene administravit*, for although that plea be found against the defendant, whether he be executor or administrator, it is now settled at law and in equity, that although the defendant is liable personally for the *costs*, in case of a deficiency of assets to pay them, yet as to the *debt*, he is only liable to the extent of the assets actually shown to have come to his hands. (*y*)

At one time it was held that if an executor plead the general issue and *plene administravit*, and the plaintiff join issue on both, and upon the trial establish the debt, but do not prove assets, the plaintiff was not only entitled to take judgment of assets *quando acciderint*, but also to the costs; because the defendant, by an unfounded denial of the debt, had compelled the plaintiff to incur the expense of proceeding to trial, and *suspended* his right to pray judgment of assets *quando acciderint*, and thereby, perhaps, enabled another creditor in the same degree, pending the protracted action, to obtain judgment for his debt in priority to that of the plaintiff. But that decision has been over-ruled, and a different rule is now established, viz. that if the executor succeed upon any one plea which goes to the whole action, and the verdict upon which establishes that the action was premature, then the defendant is entitled to judgment for the costs

(*s*) See observations of *Ashurst* J. in *Mara* v. *Quin*, 6 T. R. 10; 2 Saund. 219, a., n. 2; 3 Went. 224, 245.

(*t*) *Mara* v. *Quin*, 6 Term Rep. 10.

(*u*) Id. ibid.; 2 Saund. 219, a., note 2, qualifying Bul. N.P. 169, *Taylor* v. *Norman*.

(*x*) *Ewing* v. *Peters*, 3 Term R. 688; 1 Saund. 336, b. note 10; as to costs in equity, *ante*, 531.

(*y*) See cases of law, 1 Saund. 219, b. 336, note 1, and *Fielder* v. *Fielder*, 1 Sim. & Stu. 255, 256.

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of defence, though the plaintiff, having proved his debt, is entitled to judgment of assets *in futuro*. (z) Whenever, therefore, a plea of *plene administravit*, or of *plene administravit præter* has been correctly pleaded, the plaintiff, instead of denying the same, should pray judgment of assets *in futuro*, conditionally, in case the general issue should be found in his favour; (a) and in that case the defendant should, to avoid costs, obtain leave to withdraw the general issue, unless he be confident that upon the trial a defence will be established upon that or some other disputed plea. (b)

Plene administravit, or plene administravit præter, or ultra Judgments, or Specialty Debts as yet unsatisfied.—If an executor be sued for a simple contract, or even a specialty debt, and he be confident that he has actually fully administered all the assets actually received, and all which he ought to have received in paying other debts of equal or higher degree, then he should plead *plene administravit* generally. (c) But if there are debts of *higher* degree remaining unsatisfied, then his plea should state the same, and aver that he has fully administered, except a named sum, not sufficient to pay such outstanding higher debts. (c)

If there be no debts of higher degree outstanding, and the defendant have *some assets* in hand, but not adequate to pay the whole of the plaintiff's claim, then the plea should admit the precise amount of the actual assets, or, for safety, rather more, and plead *plene administravit ultra;* upon which, as an executor is not obliged to divide every trifle immediately he receives it, he will not be liable to pay costs; though they, as well as the residue of the debt, would be recoverable out of future assets. (d)

When the defendant has pleaded *plene administravit* or *plene administravit ultra*, and the plaintiff apprehends that those pleas can be established on the trial, he should not

(z) *Edwards* v. *Bethell*, 1 Barn. & Ald. 254; *Hogg* v. *Graham*, 4 Taunt. 135; *Ragg* v. *Wells*, 8 Taunt. 129; 1 Saund. R. 336, b. note (g), 5th edit.

(a) Id. ib.; *Hendsley* v. *Russell*, 12 East, 232; 1 Saund. R. 336, b. note (g), 5 ed. In that case the defendant pleaded the general issue, and *plene administravit*, and *plene administravit ultra*, specialty debts outstanding, and the plaintiff took judgment of assets *quando* on the last plea, and traversed the first and second pleas, and on the trial proved his debt; and it was held that the plaintiff was entitled to the general costs, although the defendant had a verdict on the *plene administravit*; but it will be observed that that decision was before *Edwards* v. *Bethel*, *supra*, n. (a).

(b) Id. ibid.; 1 Saund. 336, b. note (g) and (i).

(c) How to plead, 1 Saund. 333, note 7, *ante*, 556.

(d) *Semble*, *De Tastet* v. *Andrade*, 1 Chitty's Rep. 629, note, and 1 Saund. 336, b.; note (h), *sed quære*.

traverse the same, but admitting their truth, should pray judgment for his debt to be levied out of any *future assets* absolutely, and immediately if there be no plea to be tried, or conditionally if there be. And afterwards, when assets have come to the executor's hands, the plaintiff may issue a *scire facias*, to show cause why he should not have execution against them for the sum recovered and costs. (*e*)

If only the plea of *plene administravit* or *plene administravit ultra* has been pleaded, or if some untenable plea be withdrawn, and the plaintiff has merely taken judgment of assets, *quando*, &c., then no costs are to be paid by the *executor or administrator personally*, but they will be allowed to the plaintiff *de bonis testatoris*. (*f*)

In pleading a *judgment or bond* outstanding, it is not necessary to aver that it was recovered or executed for a just and true debt, (*g*) or to show the consideration, (*h*) whether the judgment were recovered against the defendant as executor or administrator, or by a third person. (*h*). Nor is it necessary to aver that the judgment or bond remains in full force or unsatisfied, those facts being presumed, (*h*) and the contrary must come from the other side, under a replication of kept on foot by fraud, and the plaintiff could not legally reply that the judgment was *obtained* by covin. (*i*)

A plea of a *debt outstanding* to a *third* person, must be of a *higher* degree than that sued for; but a plea of *retainer* for a debt due to the executor or administrator, may, as he cannot sue himself, be of a debt of *equal degree*. (*k*) So under a plea of *plene administravit*, the defendant may show that he retains a sum of money for the expense of administration, to which he had made himself *liable*, although he has not actually paid the same. (*l*)

It should seem that under a plea of *plene administravit* generally, the defendant may give in evidence every description of debt of equal or higher degree *due to himself*, in respect of which he has a right to *retain* assets to the amount, without specially stating such debt in the plea; (*m*) but it is in general more advisable to plead the retainer specially, because then the plaintiff will be compelled in his replication to admit either the

(*e*) 1 Saund. 219, b.

(*f*) *De Tastet* v. *Andrade*, 1 Chitty's Rep. 629, note; 1 Saund. 336, b. note (*h*); *sed quære* if *any* costs at all.

(*g*) *Further* v. *Further*, Cro. Eliz. 471; 1 Lev. 200; 1 Saund. 330, note 4; 2 Saund. 50, 51, 333, note 6.

(*h*) *Robinson* v. *Corbett*, 1 Lutw. 662; 1 Saund. 329, note 3; 331, note (*a*).

(*i*) 2 Saund. 50, 51, note 3.

(*k*) 1 Saund. 333, note 6; *ante*, 534.

(*l*) *Gillies* v. *Smither*, 2 Stark. R. 528, *ante*, 534.

(*m*) 1 Saund. 333, note 6, and id. note b. and last note, Co. Litt. 283, a.

existence of the debt, or that if he dispute it, the defendant has fully administered, supposing such debt should be proved.

Evidence in actions by and against executors and administrators.

If the representative character of an executor be put in issue by the pleadings, or be otherwise necessary to be proved, then only the *probate*, and not the original will, is evidence as to *personalty*; (n) when, *e converso*, as to *realty*, only the *original will*, proved to have been duly signed by the testator, and witnessed by three witnesses, is admissible, (n) and a probate of a will of copyhold is inadmissible. (o) A probate to one executor operates as to personalty as a probate to all. (p)

Proof of the *probate act*, or of the *act or order for granting letters of administration*, is sufficient, and indeed the best evidence against an executor. (q) It was held in equity, that where a party claims under an assignment of a lease made by the executors of the lessee, the Probate Act Book of the Prerogative Court, containing an entry of a will having been proved, and of a probate having been granted to the executors therein named, is admissible, as evidence of those persons being the executors, without even accounting for the non-production of the probate; (r) and *a fortiori* production of the book of the Ecclesiastical Court, wherein is entered the act or order of the Court for granting *letters of administration*, is evidence of the party being administrator. (s) But it is more usual, in an action against an executor or administrator, to serve him with a notice to produce the probate or letters of administration, and to prove that he has acted; but when the sum sworn to is essential to be proved, to show the extent of the assets, it is prudent to be prepared to prove the act itself, and the *oath* as to assets under a named sum, for fear the probate should not be produced; and the sum named in the oath is *primâ facie* evidence of assets to that extent. (t)

(n) *Penny* v. *Penny*, 8 Bar. & C. 335.

(o) *Jervise* v. *The Duke of Northumberland*, 1 Jac. & W. 570.

(p) *Walters* v. *Phfiel*, 1 Mood. & M. 561; *ante*, 555.

(q) *Cox* v. *Allingham*, 1 Jac. 514; *Garrett* v. *Lister*, 1 Levinz, 25, there cited.

(r) *Cox* v. *Allingham*, 1 Jacob R. 514.

(s) Id. ibid, *Garrett* v. *Lister*, 1 Lev. 25.

(t) *Woolley* v. *Clark*, 5 B. & Ald. 744.

CHAPTER VI.

INCEPTION OF AN INJURY AND PRELIMINARY STEPS BEFORE ACTUAL HOSTILITIES.

I. Unconnected with contract.
1. General observations on precautionary measures after inception of an injury.
2. Demand or request to explain an assault or slander.
3. Demand of wife, apprentice, &c.
4. Demand of goods.
5. Notice of reversioner's claim of goods seized by sheriff.
6. Notice of property being on land of another and request to permit removal.
7. Notice to remove a nuisance on wrong-doer's land.
8. Notice to discontinue a permitted nuisance.
9. Entry and demand of possession of land.
10. Power of attorney and entry to avoid a fine.
1. How to make entry.
2. Indorsement of proceedings.
11. Oaths, examinations, and proceedings connected with claims on the hundred.
II. Connected with contracts but after an incipient injury—
1. Notices, demands, &c in general.
2. Demand of goods obtained by an infant or married woman.
3. Demand to create forfeiture by landlord.
4. Notice of adverse proceedings to a party who has agreed to indemnify, &c.

IN the last Chapter we principally considered the precautionary measures that may be requisite or advisable in *anticipation* of an injury, we are now to examine what precautionary measures may be proper *after the inception* of an injury, but *preliminary* to the actual commencement of hostilities.

General observations on the precautionary proceedings after the inception of an injury.

There are many cases when, although there may have been an appearance or *inception* of an injury, yet it may be *ambiguous or uncertain* whether there was any *intention* to commit it, and it may be *necessary*, or at least expedient, to remove all doubt, and for that purpose to take or repeat, in the presence of witnesses, some preliminary step, which will at least tend to secure evidence of the right or of the injury, and facilitate the remedy. In all these cases there are two considerations—first, *what step* should be taken; and, secondly, the *manner* of taking it. At *Law* the result of litigation may frequently depend on these; and in *Equity* the recovery of costs will much depend even upon the latter; and if a proper step be taken but in an *offensive manner*, the party taking it may, entirely on that account, have to pay the costs, though it might have been otherwise if he had conducted himself with proper courtesy. (*a*)

(*a*) *Ante*, 439, note (*g*).

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Requiring explanation of an ambiguous assault.

Thus although insulting words will in no case constitute an assault, yet they may sometimes explain an ambiguous act and prevent it amounting to an injury; as where a person, pending the circuit, half drew his sword upon another as if about to thrust him, but said, if it were not assize time I would run you through the body; these words were held sufficient to show that no immediate assault was intended. (b)

2. Requiring explanation or apology for supposed insult or slander.

2. In the highest ranks of society, independently of any moral or religious consideration, no man of strong mind and undoubted courage will hesitate to testify his anxiety as well *to receive* explanation and apology for what he may reasonably suppose or knows was an hasty and inconsiderate insult or attack upon his character, or if frankly acknowledged to have been so, or from evincing his anxiety to avoid the necessity for bloodshed. On the other hand, no real gentleman of good education and real courage should shrink from making explanation and proper apology when, upon calmer consideration, he finds he has erroneously gone too far in any imputation upon another. Hence great blame must attach at least upon one if not both the parties and also upon their seconds, when any dispute terminates in *a Duel*, which *might always* be [illegible] by well-timed temperate and gentlemanly interference of any sensible friend. (c)

So amongst the inferior or middle ranks of society the same principle will also apply. In the case of *verbal or written slander*, if it were tacitly submitted to, it might subject a party to the imputation of cowardice or want of due regard for his character, and therefore he may be impelled by his own feelings or by the urgency of his friends to require an explanation; and if upon such demand it should appear that the conduct of the party was intended to be injurious, his assertion to that effect may then render litigation justifiable, which might otherwise be considered hasty, or his answer may establish whether the act complained of was in law actionable; and if not, then the [illegible] of friends to proceed in an action ought not to be com-

(b) *Tuberville* v. *Savage*, 1 Mod. 3; Bul. N. P. 15; Hawk. B. 2, c. 62, s. 1.

(c) The correspondence, in ten letters, between Sir J. De Beauvoir and Sir F. Watson, respecting the Windsor petition, advertised in the Times, Morning Herald and other newspapers of March, A. D. 1835, well illustrate the highly honourable, gentlemanly and manly manner in which apology may be demanded and reciprocal explanations offered and ultimately afforded by men of sense and proper feeling without compromise of character for true courage nor forgetful of their reciprocal duties as Christians; whilst perhaps other misguided and ill-advised individuals might, in the same circumstances, have disgraced themselves and destroyed their own as well as their families' happiness by a precipitate duel.

plied with. It too frequently happens that erroneous friends will stimulate a person to sue in cases of this nature for the vindication of his character, and he is afterwards nonsuited for want of sufficient evidence or adequate cause of action, when a little more care would have avoided such disaster, which probably increases the injury. It has been held in a criminal case, that if the terms of a letter are doubtful as to the exact accusation the prisoner meant to threaten, his declarations subsequently made, on being asked what he meant to impute, are evidence to explain the meaning of the letter.(*d*) Many cases occur of libels and words of the most insulting, provoking and injurious tendency, but which are either too general or too ambiguous to be the subject of an action without some explanation or evidence of precise meaning, and which must be obtained before any action can be safely commenced. (*e*) Thus we will suppose that a person has said verbally, "that *A.* had so "misconducted himself as to render it unfit for any respectable "person to associate with him;" or has used some other general abuse exceedingly provoking and disparaging, but which are not actionable; the friends of *A.* will insist that if he do not prosecute this aspersion they will not associate with him, and yet he can neither sue with effect nor can justify a battery of the slanderer or any counter slander that would be really actionable. (*f*) In such case *A.* might, with propriety, address a letter to the slanderer referring to the slander, and stating that he is advised that, in point of law, he cannot sustain an action for such verbal abuse, and yet that it will be very injurious to his character unless it be contradicted or repeated in writing, or in such a manner as to enable him to sue and try the truth of the slander and establish its falsity. He may then require the slanderer to contradict the report, or may in express terms tell him that if he refuse he is required, as a measure of ordinary justice, to repeat his assertion in such a form as to enable *A.* to sue. One or more friends of *A.* should present such letter to the slanderer. If he be a man whose assertion is [illegible] believed or of any weight he will thereupon either explain and refute or apologize, or if he believe the truth of the assertion he

(*d*) *Rex* v. *Tucker*, 1826, R. & M. C. C. 134; Car. Crim. L. 3 ed., 288, S. C.

(*e*) See *Robinson* v. *Jermyn*, 1 Price, 11; where it was held that these words, "Mr. *A.* and Mr. *B.*, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" published by posting a paper on which they were written, purporting to be a regulation of a particular society, were held not to be a libel; when additional evidence of what the publisher said, upon being required to explain, might have subjected him to pay very considerable damages.

(*f*) *Stuart* v. *Lovell*, 2 Stark. R. 93; *May* v. *Brown*, 3 B. & Cres. 113; 4 D. & R. 760, S. C.

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will reiterate it, and state the circumstances and grounds upon which he made the assertion (and which repetition will not be considered as a *privileged communication*, whatever might have been his first statement); (*f*) and if he have a due regard for his own character he will not hesitate to reiterate it in writing; and if he should refuse to do either, he may then be justly treated by *A.* and his friends as a contemptible slanderer, whose assertion is not worthy of credit. And if he should decline to comply, then all the real friends of *A.* ought to disbelieve the report, and consider that *A.* has done every thing in his power to clear up his character; and *A.* will be justified in sending circulars to all his friends stating what has passed, but taking care to confine himself to the above narrative without using any libellous expression of the slanderer. (*g*)

Requiring explanation in other cases.

So in many of the cases adverted to in the last chapter, as where a wife, or child, or apprentice is retained, detained or harboured by a third party, his intention to commit any injury may be uncertain, and we have seen that it is necessary to serve a *notice* upon him and make a *request* of restoration before an action can be safely commenced; and although the measure may have already been adopted, yet, for the sake of securing evidence or rendering the party more deliberately guilty of the injury and enhance the damages, it may be expedient to repeat the measure in the presence of witnesses. (*h*)

3. Demand of restoration of a wife, child, apprentice or servant.

3. We have already considered the necessity or expediency of giving a general notice or caution against harbouring an apprentice or servant, and for appointing a time for fetching the same home. (*i*) We will now suppose it to be certain that a party has already wilfully abducted or harboured a wife,

(*f*) *Smith* v. *Mathews*, 2 Mood. & M. 151.

(*g*) The following may be the form of such letter, which may be written by the party slandered, or by his attorney or friend, but of course it must be adapted to the circumstances.

Suggested form of letter in case of ambiguous slander.

Sir, Dated, &c.

I am informed that you have used expressions materially prejudicial to my character (or the character of Mr. *A.*) as that " he has so misconducted himself as to render it unfit for any respectable person to associate with him," alluding to myself, or some words to that effect. My own feelings and those of my friends compel me to ascertain whether you made any such representation, or any and what assertion and in what precise terms; and if you did, that I should adopt legal measures to vindicate my character by disproving the truth of such calumny. Supposing that you have used any such expressions, or any others injurious to my reputation, I will not anticipate that you would act so unmanly as to deny the assertion or decline answering this communication, or that you will be so regardless of reputation as to deny me the means of establishing my innocence; and I therefore request you to repeat in writing the exact words made use of, so as to enable me to proceed by action for the slander, and in which the propriety or impropriety of your assertion may be fairly tried.

I am, Sir, your's, &c.

(*h*) *Ante*, 449, 450, 510.

(*i*) *Ante*, 449, 450, and notes.

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child, apprentice or servant, but still, at least in the latter case, it will be necessary to be prepared to prove a formal demand of restoration before an action can be sustained, and that it has been so made as to constitute the party a wilful wrongdoer, (*k*) unless the plaintiff can prove an original illegal enticing away; (*l*) or as there may not be any legal obligation on the harbourer to incur the trouble or expense of sending home the relative, the prudent course will be in person or by agent to demand the return at the house of the harbourer, and at a time when he may reasonably be expected to have received the notice before suggested and to be ready to comply with its terms. (*m*) Accompanying the verbal demand, and in order to prevent any doubt or ambiguity as to what may have passed, it may be as well to produce and leave at the residence of the wrong-doer, and where the relative is harboured, a written demand to the effect stated in the note, (*m*) and wait a reasonable time until the demand has been positively refused or complied with; and if after such demand it be certain that the relative is in the house, and the outer door be open and entrance can be made without committing a breach of the peace, search may be made and the relative carried away. (*n*) But if any violent resistance should be apprehended, it will be better to proceed by *habeas corpus* or by the chief justice's warrant, excepting in the case of an apprentice, for whom that writ can only be obtained at his own instance and not on the application of the master, at least where he has been impressed. (*o*)

4. Demand of goods and notices of claims.

4. If a party have illegally taken away (*p*) or wrongfully

(*k*) *Fawcett* v. *Beaver*, 2 Lev. 63; *Winsmore* v. *Greenbank*, Willes, 582; *Fores* v. *Wilson*, 1 Peake, C. N. P. 55; *Eades* v. *Vandeput*, 5 East, 39.

(*l*) *Ashcroft* v. *Bertles*, 6 T. R. 652; *Guntor* v. *Aston*, 4 Moore, 12.

(*m*) See another form, *ante*, 450.

Demand of a wife, child, apprentice or servant illegally harboured.

Sir,—Without prejudice to my immediate right to sue you for having enticed away and already harboured Mrs. E. B., my wife, [or my "child," or "apprentice," or "servant," or my "journeyman employed by me on work still unfinished,"] I do hereby demand and require you immediately to deliver her [or "him"] up to me, [or "to Mr. *G. H.*, the bearer,"] or if she is not now in your house, then that you will state to and inform me where she is to be found, and also that you do forthwith return her to me at, &c.; and I hereby give you notice, that if you shall refuse or neglect to comply with this notice and request, I shall forthwith commence an action against you for your harbouring and detaining from me my said wife, &c. and cause other proceedings to be instituted against you according to law. Dated this —— day of ——, A. D. 1833.

To Mr. &c. Your's, &c. *A. B.*

(*n*) See 3 Inst. 134; Hale. Anal. s. 46; 3 Bla. C. 4; *post*, chap. vii. But as respects "a servant," such power of recaption only applies when the servant himself is willing to return, id. ibid.; Dalt. Justice, ch. 121.

(*o*) *Post*, chap. viii.

(*p*) 2 Saund. 47, n. (*o*); *Bishop* v. *Viscountess Montague*, Cro. Eliz. 824; *Summersett* v. *Jarvis*, 6 Moore, 56.

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assumed the right to goods, (q) in a manner which in the very taking or mode of performance constituted a *conversion*, then no further step is in general necessary, because the right to sustain an action of trover is in that case already complete.(q) But in other cases, where the original taking was lawful, and the detention only illegal, it is absolutely necessary; (r) and it is in most cases advisable, in order to *secure* sufficient evidence of a tortious conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a *formal demand in writing* of the delivery of such possession to the owner,* and which should not be sent by the post, but actually delivered to the wrong-doer in person by the owner, or by a person named in the demand, and therein stated to have been authorized to demand and receive and carry away the goods, and this in the presence of a competent witness; and if it be doubtful whether the party has any lien, it will be proper to require a statement thereof, and to offer to pay it, upon the nature of the claim and the amount being communicated and ascertained to be just; and if there should be any doubt whether the claim of lien be sustainable, and the goods be perishable, or the possession be urgently required, then it may be safer to pay the amount under protest; for afterwards, if it be ascertained that there was no lien, or not so much as claimed, the money not justly due would not be considered as voluntarily paid, but might be recovered back. (s) The refusal to comply with such a demand would in general afford sufficient evidence of a *conversion*. The form of the demand may be as in the note. (t) It is a common doctrine, that

(q) *Moss* v. *Charnock*, 2 East, 405; *M'Combie* v. *Davies*, 6 East, 540; *Lovell* v. *Martin*, 4 Taunt. 799; *Granger* v. *George*, 5 Bar. & Cres. 149.

(r) 2 Saund. 47, n. (e); 1 Chit. Pl. 179, 180.

(s) *Stone* v. *Lingwood*, 1 Stra. 651; *Green* v. *Farmer*, 4 Burr. 2218.

Form of demand to precede a conversion.*

(t) Sir, [*or* Gentlemen,]

I hereby give you notice, that the goods and chattels being, &c. [*here describe the articles fully and properly*,†] are my property, and not the property of —— or of any other person whatever, and I hereby offer to produce to you all documents in my possession or power tending to establish that the said goods and chattels are my property as aforesaid. And I hereby demand and require you to deliver the said goods and chattels to *E. F.* the bearer, who is fully authorized by me to demand and receive the same from you. And if you have any lawful lien or claim upon the said goods and chattels, I hereby require you to state the same, and I give you notice that I am ready and willing to pay the same. And in case it should occasion you any

* If a sheriff or his officers, for taking a wrong party's goods under a fi. fa., the demand is frequently entitled in the cause, but it should not by any terms, even impliedly, recognize the supposed *validity* of the commission of bankruptcy, writ or proceeding.

† See *Colegrave* v. *Dios Santos*, 2 Bar. & Cres. 76, *post* 567, note (y).

a demand and refusal are only presumptive evidence of a conversion, which may be rebutted, and therefore if it be at all uncertain whether the party upon whom the demand is made be then in actual possession of the goods, or whether it is in his power at *that time* to deliver them, (*u*) or he is merely an agent and his refusal be ambiguous, it may be necessary to make full inquiry into the facts, and to extend the demand to the supposed principals, or otherwise vary the demand according to particular circumstances. (*x*) The goods should be fully specified or described, so as at least not to mislead, and therefore a demand of fixtures, or a refusal to deliver fixtures, will neither constitute a demand or a conversion of detached furniture or goods, (*y*) but demands of "*payment* or *satisfaction*" for goods converted have been holden a sufficient demand of the goods themselves. (*z*) And if two distinct demands be made, one verbally and the other in writing, the claimant may rely upon either. (*a*) It has been supposed that the mere leaving a written demand at the residence of a party is sufficient, (*b*) and this may be so, if it be followed by a general and absolute refusal to deliver up the goods. But where there is no obligation on the party to incur the trouble or expense of removing or carrying or sending the goods from his house or warehouse, or elsewhere, to the claimant, it should seem that the party, after delivering the demand at the house, must afterwards see the party in possession, or attend at the place where the goods are, after a reasonable time for the party to give direction for the delivery of the goods, and then again verbally demand the delivery of the goods to him, and be ready to remove them, or must obtain an unqualified refusal to deliver them from some authorized person (*c*)

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inconvenience immediately upon the receipt hereof to deliver up the said goods, then I hereby give you notice that I will attend at the premises where the said goods now are, at any time you may appoint; and in default of your appointing, I then will attend on the —— day of —— next, between the hours of 11 and 12 o'clock in the forenoon, then and there to receive and remove the said goods. But in default of your compliance with this notice, by giving up and delivering to the said *E. F.* or to me, the said goods and chattels, on receipt hereof, or as aforesaid, I hereby give you notice that I shall immediately commence and prosecute an action against you for such your conversion and unlawful conduct. Dated this —— day of —— A. D. ——.

Your's, &c.

(*u*) *Smith* v. *Young*, 1 Campb. 439.

(*x*) See *Alexander* v. *Southey*, 5 B. & Ald. 247; *Green* v. *Dunn*, 3 Campb. 215; *Cable* v. *Rogers*, 2 Bulst. 312. And see other cases collected, 1 Chit. Pl. 179 to 184.

(*y*) *Colegrave* v. *Dios Santos*, 2 Bar. & C. 76.

(*z*) *Thompson* v. *Shirley*, 1 Esp. R. 31; *Coldwell's case*, Clayt. 122.

(*a*) *Smith* v. *Young*, 1 Campb. 439.

(*b*) *Logan* v. *Houlditch*, 1 Esp. R. 22.

(*c*) *Gibbs* v. *Stead*, 8 Bar. & Cres. 528. See the form, note (*t*), *ante*, 566.

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5. Notice by reversioner of his interest in goods seized by sheriff.

5. So although in general a sheriff, who seizes goods under a writ of fieri facias, is bound, at his peril, to take care and ascertain whether the same are the property of the party against whom the writ was issued; yet in a late case it was held, that if a party has goods on hire for a term, and the sheriff seize them under an execution against him, the *reversioner*, who so let the goods, cannot support any action against the sheriff for selling the entire and absolute property of such goods, unless he show that "he gave the sheriff *notice* that the goods were hired for a term only, and that they were the property of the reversioner, and that the sheriff must only sell the limited or temporary interest;" and it appears to have been considered in the same case, that mere intimation to the sheriff's officer, that the goods were hired, would not be sufficient, and Bayley, J., said, "you should have informed the sheriff of the nature of your interest, and then he might have sold the hirer's interest only;" and *per* Abbott, C. J., "it is very desirable that persons should give their notices correctly." (*d*)

6. Notices of property being in the house or upon the land of another, and request to have same restored, or to permit claimant to enter to remove same.

6. When by any lawful means the personal property of the owner is in the house or upon the land of another, the latter, before he can legally enter to bring it away, must (except, perhaps, where the occupier has wrongfully placed or detained it there,) first give notice of the circumstances under which the goods are there, and civilly request the occupier to restore them to him, or request permission to enter on purpose to remove them himself, and offer to pay any possible damage that would be occasioned by such entry; after which, in case of refusal, the owner might legally enter, or at least sustain an action of trover. (*e*) When by unavoidable accident trees are blown down, or fruit falls upon the land of another, or cattle enter by reason of the occupier's neglect to repair his fence, it should seem that such an entry would be legal, but it is expedient previously to give the suggested notice, at least in all cases where the occupier is not himself to blame; (*e*) for though the occupier may not have a right to the property which is on his premises under any such circumstances, yet it is but reason-

(*d*) *Dean* v. *Whittaker*, 1 Car. & P. 347, at Nisi Prius and afterwards in full Court, and see Tidd, 9 ed. 1003, *sed quære*. If the reversioner had not known of the execution, his neglect to give notice certainly then ought not to prejudice his remedy, for a sheriff seizes at his peril, Tidd, 9 ed. 1008.

(*e*) See *Anthony* v. *Hany*, 8 Bing. 191, where circumstances of this nature were considered, and a plea held bad because it did not show *how* the goods were on the plaintiff's premises so as to justify the entry; see further next chapter.

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able that he should first have an opportunity, at his own convenience, to remove them in his own way off the premises, and deliver them to the owner, without allowing the latter himself to enter. The form of the notice may be as subscribed. (*f*)

7. Notice to an occupier to remove any nuisance on his own land, but annoying the party giving such notice.

7. Where the occupier of an house or land has *erected* or *continued* on his land something obnoxious, and which occasions a nuisance to another, it seems to be in general advisable (at least in the case of a mere *private* nuisance) to give him notice, or to request him to remove it, and to wait a reasonable time until after his neglect to remove, before the party injured should *enter* the house or land to remove such nuisance, because in these cases the occupier generally ought to have an opportunity of himself removing the matter complained of before another intrudes upon his land. (*g*) Such a request to remove is always essential before *an action* can be commenced against a mere *continuer* of a nuisance; (*h*) though in such a case it should seem that a notice left with one occupier to remove the nuisance will subject another person who comes into possession shortly afterwards to an action if he do not remove the injury. (*i*) It will be observed, that even in the case of public nuisances to highways, the highway act in general requires a notice to remove the nuisance before the surveyor can enter, or himself abate it. (*k*)

In a late case, (*l*) a distinction was taken in regard to the proceeding to remove nuisances by acts of *commission*, and those by *omission*; and it was considered that as nuisances by act of *commission* are committed in defiance of those whom such nuisances injure, therefore the injured party may abate them *without notice* to the person who committed them; but

Notice of a tree having been blown down on land of another, and of intention to remove same.

(*f*) Sir,—A tree, recently growing in my field called ——, has been blown down, and has fallen upon your field called ——, and I am desirous of having the same removed back into my field, or into, &c. (describing the place), in the way and manner, and at a time least inconvenient and prejudicial to you, and I am willing to pay you for the reasonable trouble and expense of so removing the same, should you prefer to direct the removal yourself; but if not, then I will, at the time and in the manner I request you to fix, remove the same by my own servants, horses, and tackle; and in either case I am ready to make compensation for any damage you may have sustained. In case I should not hear from you to the contrary, I will attend with my servants, horses, wain, and tackle, on, &c., at the hour of, &c., and cause the said tree to be removed in the way and manner best calculated to avoid any increase of damage. I am, Sir,

Your's, &c., *A. B.*

(*g*) *Earl Lonsdale* v. *Nelson*, 2 Bar. & C. 302, 311; 3 Dowl. & R. 556, S. C.; see form, *post*, 570, n. (*o*)

(*h*) *Winsmore* v. *Greenbank*, Willes, 583; *Brent* v. *Haddon*, Cro. Jac. 555; *Penruddock's Case*, 5 Coke's R. 100, 101; *Anon.* Jenk. 260; *Salmon* v. *Bensley*, Ry. & M., C. N. P. 189.

(*i*) *Salmon* v. *Bensley*, Ry. & M. 189, *sed quære*.

(*k*) 13 Geo. 3, c. 78, s. 9, &c.; and see *post*, ch. vii.

(*l*) *Earl Lonsdale* v. *Nelson*, 2 Bar. & C. 302; 3 Dowl. & R. 556, S. C.

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that where the nuisance, even when public, is from *omission*, as in the case before noticed of an occupier suffering his trees to grow over his neighbour's land, or in the second case suffering a building in a public port to be out of repair, (*m*) then, under any circumstances, a notice to the wrong-doer must be given before any attempt be made to remove the nuisance. (*m*) In the case of a nuisance *immediately* and suddenly requiring abatement without any delay, no previous notice might be requisite. (*m*) And in general, pleas justifying the abatement of a private nuisance of *commission* do not aver any request or notice to remove. (*n*) But still in all cases, when time will allow, and no serious injury is likely to arise during the delay, it seems always prudent, as well in case of public as of private nuisances, to *serve a notice*, and to wait a reasonable time for the wrong-doer's compliance, and which notice may be in the form given in the note. (*o*)

8. Notices to cease a permitted nuisance.

8. In case also of a nuisance or easement, if it has been suffered to exist for a considerable time, and still more if it were erected with the leave of the party at length complaining, although a license is in general revocable, yet he must, before he commences an action for the continuance, formally request the

(*m*) *Earl Lonsdale* v. *Nelson*, 2 Bar. & C. 302; 3 Dowl. & R. 556, S. C.

(*n*) See *Raikes* v. *Townsend*, 2 Smith's R. 9; 3 Chitty's Pl. 5 ed. 1102, 1110, 1118, 1130.

(*o*) See *Raikes* v. *Townsend*, 2 Smith, 9. Dated, &c.

Suggested form of a notice to remove a public or private nuisance, or that the party will himself remove.

Sir,—Whereas I am possessed of a mill, land, and premises situate in the parish of ——, in the county of ——, and carry on therein the trade and business of a ——; and I am entitled to the use of a watercourse running through a close called ——, and another close called ——, in the said parish, in your occupation, unto my said mill, and land and premises, for the supplying the same with water; and divers dams and obstructions have been illegally made, and are now continued in your said closes, or in some part of the premises in your occupation across or near to the said watercourse, and in consequence thereof I have been deprived of the use of the water thereof at my said mill, lands, and premises, and my said trade and business is thereby greatly obstructed and impeded, and several of my workmen are hourly prevented from working there as they otherwise would: *Now, therefore*, without prejudice to my right of action for the damages I have already sustained, or may sustain, in consequence of the premises, I hereby give you notice, and require you immediately to remove the said dams and obstructions, and to cause the water in, or which ought to flow along the said watercourse, to flow to my said mill, lands, and premises, as the same ought to do. And I further give you notice, that if the said dam and obstructions shall not have been removed, and the water caused to flow as aforesaid, before 12 o'clock at noon to-morrow, I shall, with such workmen as may be necessary, immediately, or soon after that hour, enter in and upon your said closes, lands, and premises, for the purpose of abating and removing, and I shall cause to be abated and removed, the said dams and all other obstructions so far as shall and may be necessary to cause the water to flow along the said watercourse as the same ought to do, to my said mill, lands, and premises, and the expense of which I shall require you to defray. If any other hour to-morrow for my attending with my workmen for the purpose aforesaid would suit you better than that above named, I will thank you to let me know, in order to alter the arrangement accordingly. Your's, &c.

To Mr. ——.

removal;(p) and, therefore, where a license had been given to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), it was held that such license could not be recalled at pleasure, after it had been executed at the defendant's expense, at least not without tendering the expenses he had been put to; and that, therefore, where no such offer had been made, no action could be sustained for such a private nuisance in stopping up the light and air, and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light.(q)

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9. Entry and demand of possession of land.(r)

9. Before a person entitled to real property can support an action of ejectment or trespass against a person for retaining possession, he must be prepared at common law to prove that the possession is *adverse;* therefore, if the occupier has been *permitted* to occupy as a tenant, that *permission* must, in the case of a tenancy, be determined by a notice to quit, and if there be no tenancy but at sufferance, then a formal demand of possession should be made, so as to determine the owner's permission, and which, for the sake of certainty should be *in writing* as well as verbal, and may be made as in the subscribed form;(s) and the lord of a manor cannot sustain ejectment for an inclosure on his waste, made with his knowledge or acquiescence, without proving a previous demand.(t) And in some particular remedies given to landlords as for double yearly value of premises held over, there must be a demand in writing of the possession;(u) and under the 1 Geo. 4, c. 87, s. 1, in order to entitle a landlord to security from the defendant in an action of ejectment, the latter must, by the express terms of the act, be served with a written demand.(x) But in general a mortgagee need not serve or give any notice or demand, verbal or written, before an ejectment against the mortgagor, or a

(p) *Ante*, 336 to 340, as to when a license cannot be revoked, and how it is to be revoked.

(q) *Winter* v. *Brockwell*, 8 East, 308.

(r) As to perfecting a disclaimer, *Doe* d. *Calvert* v. *Frowd*, 4 Bing. 557, and *ante*, 482; and as to perfecting a *right of entry* for non-payment of rent, *ante*, 480 to 482.

(s) *Doe* d. *Brune* v. *Rawlins*, 10 East, 261; *post*, 573, note (*h*).

(t) *Doe* d. *Foley* v. *Wilson*, 11 East, 56.

(u) 4 G. 4, c. 28, s. 1; *Johnstone* v. *Huddlestone*, 4 B. & C. 922, but it has been holden that a written notice to quit *before* the expiration of the term is a sufficient demand; *Cutting* v. *Derby*, 2 Bla. R. 1075; *Wilkinson* v. *Colley*, 5 Burr. 2694, *sed quære* whether the statute did not intend to require a demand *after* the right to possession was complete, and the latter demand is recommended.

(x) In this case the tenant holding over must have held under a *written* demise or agreement; and see decisions as to the notice, *Doe* d. *Marquis of Anglesea* v. *Roe*, 2 Dow. & Ry. 565, and *Doe* d. *Marquis of Anglesea* v. *Brown*, Id. 688, &c. See the form of notice, *post*, 572, note (*g*).

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person who came into possession under him since the mortgage, (y) and who has not been acknowledged tenant by the mortgagee. (z) Nor is any notice or demand necessary when a person holds over after the expiration of a lease, or of a notice to quit, without any fresh agreement authorizing him to retain possession; (a) and a mere negociation for a lease after a person has assumed or retained possession, will not render a notice or demand necessary; (b) nor is a notice or demand requisite when a vendee has been let into possession without a conveyance, and has neglected to pay instalments according to stipulation. (c) But where a vendee has been let into possession, and has complied with the terms in all respects, a demand of possession must be served, to make his possession tortious, before an action of ejectment can be sustained against him. (d) So an *actual entry* within twenty years is essential to prevent the statute of limitations barring an action of ejectment, unless that action be actually commenced within twenty years next after the right accrued; (e) and when the twenty years are nearly expiring, it is always prudent to make a formal entry and demand, for then the claimant need not, since the statute 4 & 5 Anne, c. 16, s. 15, commence his action of ejectment till within one year after such entry, so that his time for proceeding may by such entry be extended to nearly *twenty-one* years. (f)

The subscribed form of demand, under the statute 1 Geo. 4, c. 87, may be readily applied to any other demand of possession, (g) but another general form of entry is also sub-

(y) *Ante*, 258; *Thunder* v. *Belcher*, 3 East, 449; *Doe* d. *Roby* v. *Maisey*, 8 Bar. & Cres. 767; *Doe* d. *Fisher* v. *Giles*, 5 Bing. 421; 2 Moore & P. 749, S. C.

(z) *Doe* d. *Whittaker* v. *Hales*, 7 Bing. 322; *ante*, 258; *aliter* if mortgagee has *accepted rent* from subtenant, id. ibid.

(a) *Cobb* v. *Stokes*, 8 East, 358.

(b) *Doe* d. *Knight* v. *Quigley*, 2 Camph. 505; *Doe* d. *Brune* v. *Rawlins*, 10 East, 261.

(c) *Doe* d. *Moore* v. *Lawder*, 1 Stark. R. 308; *Doe* d. *Leeson* v. *Sayer*, 3 Camp. 8.

(d) *Right* d. *Lewis* v. *Beard*, 13 East, 210; *Doe* d. *Newby* v. *Jackson*, 1 Bar. & Cres. 448; 2 D. & R. 514, S. C.

(e) 21 Jac. 1, c. 21, s. 1; 4 Ann. c. 16, s. 15; *Goodright* v. *Cater*, Dougl. 477, 485, n. 1; Adams' Eject. 3 ed. 102.

(f) Id. ibid.; Adams' Eject. 3 ed. 102, 103.

Demand of possession by landlord or his agent on statute 1 G. 4, c. 87, s. 1.

(g) Sir,—I do hereby (*or*, if given by an agent, "I do hereby, as the agent of and for *A. B.*, your landlord, and on his behalf,") according to the form of the statute in such case made and provided, demand and require you forthwith to quit and deliver up to me (*or*, "to the said *A. B.*") the possession of the dwelling-house (*or*, "farm, lands and premises,") with the appurtenances, situate and being in the parish of in the county of ——, and which were held by you as tenant thereof under a lease (*or* "agreement in *writing*,") bearing date, &c. (*date of lease or agreement*) for the term of —— years, which expired on the —— day of —— last, (*or*, "from year to year, and which tenancy was determined by me," *or*, "by the said *A. B.*," *or*, "by you,") by a regular notice to quit on the —— day of —— last. Dated, &c.

Your's, &c.

A. B. (*or*, "*E. F.* agent for the said *A. B.*")

To Mr. *C. D.* tenant in possession.

scribed, (*h*) and reference to the directions in making an entry to avoid a fine may also assist.

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10. Of a power of attorney to make entry and avoid a fine, and entry and proceedings thereon.

10. In certain cases, when it is known that a fine has been levied with proclamation, it is *necessary* (if it were operative) to make an actual entry to avoid it within *five* years after. (*i*) But if a fine that has been levied was wholly invalid or inoperative, then no entry to avoid it is necessary; as if a tenant for years, without making a feoffment, or a lessee for years of a tenant for life hold over, and afterwards levy a fine, then no entry to avoid it is necessary. (*k*) However, if the party levying a fine had previously gained a freehold, although tortiously and by disseisin, an entry to avoid his fine is in general required; (*l*) as if a man enter under a devise which is void, he by his entry gains the freehold by abatement, and a fine levied by him with proclamation may be used as a bar by non-claim, much however might depend upon the facts as to the leases then existing. (*m*) In that case, however, perhaps the judge went too far upon the facts proved, for the regress of the tenants perhaps restored the seisin. (*n*) In cases of the least doubt whether a valid fine has been levied, it is *always prudent* to make a formal entry, to avoid " all fines that may have been levied, if any such

Entry upon and demand of possession of land, &c. to determine any permission to occupy or a mere tenancy strictly at will or sufferance, or to prevent the operation of the statute of limitations, 21 Jac. 1, c. 16, s. 1.

(*h*) I (*or*, " I, *E. F.* as the attorney and agent of and for *A. B.*, and by him duly appointed and authorized,) do now make this entry into and upon this house and land and premises, in the name of the whole of the buildings, lands, tenements, hereditaments, and premises thereunto belonging, or therewith used, occupied, or enjoyed, with intent henceforth to resume and obtain, and keep the actual possession thereof for my own use and benefit (*or*, " for the use and benefit of the said *A. B.*") and to put an end to all and every subsisting tenancies or permissions to hold or occupy the same tenements, hereditaments, or premises, or any thereof, if any such there be or have been, and also to interrupt and prevent the operation of any statute or statutes of limitations, that otherwise might or would prejudice or affect my claim to the said tenements, hereditaments, and premises, or any part thereof; and I do now demand and require you, *G. H.* (the present occupier,) and all other persons and person whatsoever, immediately to give up to me the full, entire, and peaceable possession of these and all other the said tenements, hereditaments, and premises, with the appurtenances, or in default thereof, I shall forthwith pursue such proceedings as I shall or may be advised to adopt in the premises. Dated, &c.

Your's, &c. *A. B.*

To Mr. *G. H.* (the occupier) and all others whom the same doth or shall or may concern.

(*i*) *Doe* d. *Lee Compere* v. *Hicks*, 7 T. R. 433; Id. 727; *Doe* d. *Duckett* v. *Watts*, 9 East, 17; *Berrington* v. *Parkhurst*, 13 East, 489; *Doe* d. *Anderson* v. *Turner*, 1 Car. & P. 91; *Doe* d. *Davis* v. *Davis*, 1 Car. & P. 130; Adams' Eject. 93 to 103.

(*k*) *Doe* d. *Burrell* v. *Perkins*, 3 M. & S. 271; 2 Bla. C. 356, note 19. See 2 Bla. C. 357; *Doe* d. *Davis* v. *Davis*, 1 Carr. R. 130; *aliter* if a lessee for years make a feoffment and then levies a fine; in that case an entry to avoid it within five years after, or rather within five years after the expiration of the demised term, is essential, *Hunt* v. *Bourne*, Salk. 339; *Pomfret* v. *Windsor*, 2 Ves. 472, 481; *Whaley* v. *Tankard*, 2 Lev. 52; Adams, 3 ed. 97.

(*l*) See cases Adams' Eject. 3 ed. 97, 98, and last note.

(*m*) *Hardman* v. *Clegg*, Holt's C. N. P. 657.

(*n*) Co. Lit. 324.

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there be;" for on searching for such fine it may have escaped notice, and the entry can never prejudice.

The demise in a declaration in ejectment must be laid after the entry, (o) and mesne profits cannot be recovered antecedent to such entry. (p) But it must be remembered that such entry would be of no avail if more than twenty years have elapsed since the right accrued, because then the right of entry is in that case taken away by 21 Jac. 1, c. 26; and if more than five years have elapsed since a valid fine was levied, it is then too late to attempt to avoid it by entry. (q) We will now consider practically the mode of making entry, (r) and which may be collected from the following cases and forms.

In order that an entry to avoid a fine may be effectual for that purpose, it is requisite that the party entering, or for whom the entry is made, should have a *right* of *entry*, and not merely a *right* of *action*. (s) The claim must be by entry *upon* the land claimed, and must not be a mere casual entry, but an entry made *animo clamandi* with the express declared intention of claiming the land. (t) A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question, he said to the tenant he was heir to the house and land, and forbade him to pay more rent to the defendant, but he did not enter into the house when he made the demand. On which it was agreed, that the claim at the gate was not sufficient. Then it was proved that there was a court before the house which belonged to it, and though the claim was at the gate, yet it was on the land, and not in the street, and that was held good. (u) And the entry must be into and upon the land comprised in the fine, for an entry into other land, claiming that which is comprised in the fine, is held to be insufficient. (x) As the entry must be *actual*, (y) a mere fictitious entry will not suffice, and therefore the delivery of a declaration in ejectment does not amount to an entry to avoid a fine, though the defendant appear and confess lease, *entry* and ouster, for this is but a *supposed* entry for the purpose of making the demise, and in the case of fine, the actual entry must be made before the time

(o) *Berrington* v. *Parkhurst*, 13 East, 489; *Doe* d. *Lee Compere* v. *Hicks*, 7 T. R. 727.

(p) *Doe* d. *Lee Compere* v. *Hicks*, 7 T. R. 727; 1 Saund. 319, b.

(q) See Statute of Fines, 4 Hen. 7, c. 24. See exception, *ante*, 573, n. (k).

(r) Tidd, 9 ed. 1198, &c., and Adams' Eject. 3 ed. 100.

(s) *Stowell* v. *Lord Zouch*, Plowd. 358; 5 Com. Dig. 288, 2 ed.; 1 Prest. Conv. 246, 247.

(t) *Clerk* v. *Rowell*, 1 Mod. 10; *Ford* v. *Grey*, 6 Id. 44; *Williams* d. *Hughes* v. *Thomas*, 12 East, 186; *Doe* v. *Hicks*, 7 T. R. 433.

(u) *Anon.* Skin. 412.

(x) *Focus* v. *Salisbury*, Hardreso, 400.

(y) *Doe* v. *Hicks*, 7 T. R. 433.

when the demise is laid. (z) Where there are several freeholds possessed by different tenants claiming the freehold, though tortiously, a separate entry must be made on each, but an entry in part will be good for all possessed by one tenant, and a special entry into a house with which lands are occupied, claiming the whole, is a good entry as to the land. (a) The claim must be of such a nature as corresponds with the estate, and consequently an entry on the land by a *cestui que trust*, or any other legal act, is not sufficient to avoid a fine, but it must be by a bill in Chancery. (b) If by force or violence the person claiming be prevented from making an entry on the land, he must make a claim as near to the same as he can, and which will then be equivalent to an actual entry. (c)

After claim or entry made, the party seeking to avoid the fine must prosecute his claim or entry by ejectment within one year from the time of claim or entry, (d) though he may make a new claim or entry and again prosecute the same within one year, but in both cases the ejectment must be commenced, though it is not required that judgment should be obtained, before the expiration of the five years. (e) The claim need not necessarily be made by the party entitled himself, but may be effected by any other person for him, either under a power previously given, or without any previous authority, provided an assent be subsequently given *within five years* from the time of levying the fine, which is essential; (f) but an entry or claim, to prevent the operation of a fine, is unavailing, unless the owner give authority before, or agree to it after it has been done, and within such five years. (g) The *power of attorney* to make entry to avoid a fine may be in the subscribed form. (h)

(z) 1 Saund. 319; *Berrington* v. *Parkhurst*, 2 Stra. 1086; *Oates* v. *Brydon*, 3 Burr. 1897; *Goodright* v. *Cator*, Doug. 480.

(a) 1 Lill. Ab. 516; 3 Cru. Dig. 501, 2 ed.

(b) *Glumdalclitch* v. *Leman*, 2 Bla. R. 293; 1 Chit. Ca. 268, 278. *Sed quære*, see note by Atherly Shepp. Touch. 36; 1 Prest. Conv. 248.

(c) Lill. s. 419; 1 Inst. 253, b.

(d) 4 Ann. c. 16, s. 16.

(e) See 1 Prest. Conv. 245, 216.

(f) Co. Lit. 245, a.; *Fitchet* v. *Adams*, 2 Stra. 1128.

(g) Co. Lit. 258, a.; Shepp. Touch. 35, 36.

Power of attorney to make entry to avoid a fine.

(h) *To all* to whom these presents shall come, I *A. B.* of, &c. Esquire, send greeting.

Whereas I am legally entitled to, &c. [*describe the manors, messuage, buildings, land and premises, and the local situation, with as much particularity as in a declaration in ejectment,*] and also unto divers other tenements, hereditaments and premises, situate and being in the same county, and also unto divers other tenements, hereditaments and premises, situate and being elsewhere in England, of which it is supposed that a fine has been levied by *C. D.* of, &c. for the purpose of barring my right of entry and title to the same. And whereas I am desirous that an entry should be made, for the purpose of avoiding the effect of the said supposed fine; and I am also desirous of avoiding

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11. In order to *perfect* a claim for *compensation* against an *Hundred* for damages committed by rioters, the 7 & 8 Geo. 4, c. 31, sects. 3 and 8, require certain preliminary steps, which

11. Oath, examinations and forms, connected with claims upon a *Hundred*.

the effect of all and every other fines and fine that may have been levied adverse to my right to or interest in the said tenements, hereditaments and premises, or to the right or to the interest of any person under whom I may or might claim; and also of preventing the operation of any statute of limitation that may or might otherwise affect or prejudice my right or title or power or means of recovering the said tenements, hereditaments and premises. Now these presents witness, that I the said *A. B.* have made, nominated, constituted and appointed, and in my place and stead put, and by these presents do make, nominate, appoint and constitute, and in my place and stead put *E. F.* of, &c. my true and lawful attorney and agent, for me, and in my name and on my behalf, to make an actual entry and entries in, to and upon the said tenements, hereditaments and premises, or any part or parts thereof, and there to claim the freehold and possession of the same from and against the said supposed fine, and all and every such other fines and fine as aforesaid, and from and against all parties thereto, and from and against all persons whatsoever, and generally to do all such other acts and things whatsoever in and about the premises, in order and to the intent and purpose that an actual entry and entries may be made upon the said tenements, hereditaments and premises, in order to avoid the effect, if any, of any such supposed fine and other fines and fine as aforesaid, *in case of non-claim*, according to the statutes in such case made and provided, and that as fully and effectually, to all intents and purposes whatsoever, as I the said *A. B.* might or could do in my own proper person if I were personally present, and myself did the same. And also to make entry and entries in and upon all and every part of the said tenements, hereditaments and premises, to avoid and prevent the operation of any statute of limitations, that might otherwise affect or prejudice my right or claim to the same, and also to demand possession of and avoid and determine every subsisting tenancy or permission to occupy the said tenements, hereditaments and premises, if any such there be. In witness whereof I have hereunto set my seal, and subscribed my name, this —— day of ——, A. D. ——.

Signed, sealed and delivered, by the said *A. B.*, in my presence, on the day and year aforesaid, } *G. H.* *A. B.* (L. S.)

Entry and demand thereupon.

Words to be used in presence of witnesses at principal entrance door *upon the* premises on making such entry.

I *A. B.* [*or E. F.*, the attorney of and for *A. B.* of, &c. and by him lawfully constituted and appointed as his attorney and agent in this behalf, under and by virtue of a deed-poll duly made by the said *A. B.*, and bearing date the —— day of ——, A. D. ——,] do now here declare and give this public notice, that I, on my own behalf, [*or* " as such attorney and agent as aforesaid, on behalf of the said *A. B.*"] have made and do now make this entry in and upon these premises, being, &c. [describe them as in power of attorney,] in order and to the intent and purpose to avoid the effect of a certain supposed fine, levied by *C. D.* of, &c. of the said premises, and also of all and every other fines and fine, and acts and act, and proceedings whatsoever, that have or hath, or may have been levied or made or done of the said tenements, hereditaments and premises, or any part or parts thereof, or in anywise relating to the same; and for the same purpose and intent I do now, on my own behalf, [*or* " as such attorney and agent as aforesaid, for and on the behalf of the said *A. B.*"] now here publicly and openly demand and claim the freehold and possession of the same tenements, hereditaments and premises, against the said supposed fine, and all and every other fines and fine, acts or act, or proceedings, if any such there have been or be against the said *C. D.*, and all and every other persons and person whatsoever " and whomsoever." Dated this —— day of ——, A. D. ——. Signed, *A. B.*

Memorandum of the entry and demand having been made, and which is to be indorsed on the original power of attorney.

Memorandum, That on this —— day of ——, A. D. 1833, I *E. F.* did, in pursuance and by force and virtue of the within written power of attorney in this behalf, make an actual entry into and upon the within-mentioned (premises), [or in and upon so much of the within-mentioned premises as were and are situate within the county of ——,] and did there, in the name and on the behalf of the within named *A. B.*, claim the freehold and possession of the same (premises), against the said supposed fine, and all other fines and fine, and acts and act, and proceedings whatsoever, as within mentioned. Dated this —— day of ——, A. D. ——.

Witness, &c. *E. F.*

must be carefully observed. (*g*) Section 3 enacts "that no action or summary proceeding shall be maintained by virtue of that act for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, *or* the servant or servants who had the care of the property damaged, shall, *within seven days* after the commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the *examination* of such justice touching the circumstances of the offence, and become bound by *recognizance* before him to prosecute the offenders when apprehended:" and the action must be brought within three calendar months after the commission of the offence. (*g*)

Upon the prior act it was decided that a *house*, part of which was occupied by the plaintiff as a shop, and the remainder by the lodgers, no part of the family sleeping therein, was a dwelling-house within the protection of the 1 Geo. 1, stat. 2, c. 5; (*h*) but a building intended as an house, but not completed nor inhabited, but in which straw was placed, is not a house or warehouse under the recent act; (*i*) and hustings erected to take the poll at a contested election for members to serve in parliament, were held not to be within the 57 Geo. 3, c. 19, s. 38, (*k*) and a gaol was considered as not within the last act. (*l*)

A *beginning to demolish* is within the act, (*m*) but there must be proof of an intention to demolish, at least in part; (*n*) a burning in part is in part demolition. (*o*) It must have been done *feloniously* by persons *riotously* and *tumultuously* assembled within the meaning of the other act of the same session, 7 & 8 G. 4, c. 30, sect. 2. (*p*)

The 7 & 8 Geo. 4, c. 31, s. 2, expressly directs that *full compensation* (not as before limited to £200,) shall be yielded, not only for the damage done to the buildings and machinery enu-

(*g*) See the enactment in 7 & 8 G. 4, c. 30, making the offence felony, and decisions thereon, *ante*, 172 to 174, 400. 410, 411; and see Chit. Col. Stat. tit. *Hundred*.

(*h*) *Rex* v. *Wood*, 2 Stark, 269.

(*i*) *Elsmere* v. *Inhabitants of St. Briavells*, 8 B. & C. 461.

(*k*) *Allen* v. *Ayre*, 3 Dowl. & Ry. 96.

(*l*) Western Circuit, 30 Jan. 1832.

(*m*) *Lord King* v. *Chambers*, 1 Stark. R. 195.

(*n*) Id. ibid.; *Sampson* v. *Chambers*, 4 Campb. 221; *Lord King* v. *Chambers*, Id. 377; *Smith* v. *Bolton*, Holt, C. N. P. 203; *Rex* v. *Thomas*, 4 Car. & P. 237.

(*o*) *Nesham* v. *Armstrong*, 1 B. & Ald. 146; Holt, C. N. P. 466, S. C.

(*p*) *Reid* v. *Clarke*, 7 T. R. 496; *Rex* v. *Thomas*, 4 Car. & P. 237; *Rex* v. *Inhabitants of Gainsbury*, 4 D. & R. 250; *Smith* v. *Bolton*, Holt, C.N. P. 203; *Burrows* v. *Wright*, 1 East, 615; *Beckwith* v. *Wood*, 1 Bar. & Ald. 487; 2 Stark. Rep. 263, S. C.; *Beatson* v. *Rushworth*, Marsh. R. 362; 7 Taunt. 45; 3 Price, R. 48, S.C.

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merated, but also for any *damage* which may *at the same time* be done by any such offenders, to any fixtures, furniture or goods in such buildings. It was holden on the prior act, that the hundred are only liable for things demolished by the rioters, or destroyed in the demolition of the house, and not for any goods *stolen* from the premises. (*q*)

It has been held that both the reversioner or landlord and the tenant in possession may respectively sue separately, the one for the injury to his possession and to his furniture or goods, and the other for the injury to his reversionary interest, and for the damage, rendering it necessary to repair. (*r*) Such an action is maintainable by a trustee, in whom the legal estate is vested for existing purposes, and as it seems even by a bare trustee of a satisfied term. (*s*)

The steps requisite to be taken.

The *seven days* allowed for making the oath and submitting to examination are to be calculated exclusive of the day on which the damage was committed. (*t*)

With respect to the *justice or magistrate before whom the oath and examination* should be made, it has been held upon another act, that the examination was sufficient if made by a justice who lived two miles from the place, although it was proved that there were many who lived nearer, as the act was only directory in this respect. (*u*) But the prudent course would be precisely to comply with the very words of the act, and as care is essential to disclose all the material facts, the party injured should, as soon as practicable after the felony has been committed, apply to an experienced attorney, who should examine the owner and servants and take down all the particulars, and then prepare a full affidavit or oath to the effect in the subscribed form, and as soon as convenient, and at all events before the seven days have expired, tender the oath and the proposed deponents to one of the nearest justices, and who would be bound, upon proper request, to take the oath and examination, or, in case of refusal, would be liable to a special action on the case, if by his neglect the party injured should lose his remedy against the hundred. (*x*) If there be several partners, all present or resident upon the damaged premises at the time of the

(*q*) *Smith* v. *Bolton*, Holt, C. N. P. 201; *Greasley* v. *Higginbotham*, 1 East, R. 636; *Ratcliffe* v. *Eden*, Cowp. 485; 2 Stark. Evid. tit. *Hundred*.

(*r*) *Pellew* v. *Inhabitants of Wonford*, 9 Bar. & Cres. 134; 4 Man. & R. 130, S. C.

(*s*) *Pritchett* v. *Waldron*, 5 T. R. 14.

(*t*) *Pellew* v. *Inhabitants of Wonford*, 9 B. & C. 134;

(*u*) Bul. N. P. 186.

(*x*) *Green* v. *The Hundred of Buccle-church*, 1 Leonard's Rep. 223, 224; but *semble*, it is incumbent on the party injured to see that his oath, &c. are in due form.

felony, should be examined and make oath, and the oath of one of them would not suffice. (y) If the principal reside on the premises and be at hand when the felony was committed, it will suffice if *he* make the oath and be examined, and it is not also necessary for his servant or any other person to be examined,(z) though it would be otherwise if the principal were absent from home and a servant in charge. (a) With respect to servants, *all* those in charge should be examined; (b) and a steward residing at a distance, although he have the general superintendence, will not in that case be the proper person to make oath, if there were labourers on the spot having the actual care of the premises. (c) But it has been recently held upon the present act, that the servant or servants, who, in the absence of a master, have the *general care and superintendence* of the property, and who represent him in his absence, and *not all* who have the special care *under them* of *particular parts* of the property contained in a dwelling-house or manufactory, are the proper servant or servants who, by the 7 & 8 Geo. 4, c. 31, s. 3, are requred to go before a justice and to state upon oath the names of the offenders, and to submit to examination touching the circumstances of the offence, and although there be even 160 other *sub*-servants having the care of particular parts, neither of *them* need appear before the justice, (d) though in extreme caution, it would be safer that *all* should make oath and tender their examinations.

With respect to the *oath itself*, it will be observed, that the act only requires the party making it to state the names of the *offenders, if known*, and therefore it is not now necessary to exclude or to swear negatively, that the deponent has no *suspicion* of the offender. (e) And although upon a prior act it was held that the oath should be in the *disjunctive*, that he did not know the offenders, *or any of them*, and that it would not suffice merely to state affirmatively, that the party swearing suspected that the offence had been committed by some person or persons to him unknown, without adding negatively, that he did

(y) *Nesham* v. *Armstrong*, 1 Bar. & Ald. 146; Holt, C. N. P. 466, S.C.

(z) *Rolfe* v. *Elthorne*, 1 Mood. & M. 185; *Pellew* v. *Wonford*, 9 Bar. & C. 134, a decision on 9 Geo. 1, c. 22, s. 7, now repealed.

(a) Id. ibid.

(b) *Duke of Somerset* v. *Mere*, 4 Bar. & Cres. 167; 6 Dowl. & R. 247, S. C.; but see *Lowe* v. *Inhabitants of Broxtowe*, 3 Bar. & Adolph. 550.

(c) *Duke of Somerset* v. *Mere*, 4 B. & C. 167; 6 D. & R. 247, S. C.; *Rolfe* v. *Elthorne*, 1 Mood. & M. 185.

(d) *Lowe* v. *Inhabitants of Broxtowe*, 3 Bar. & Adolp. 550.

(e) *Pellew* v. *Inhabitants of Wonford*, 9 Bar. & Cres. 134.

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not know the offenders, *or any or either of them.* (*f*) But it has been held that it suffices, under the *present* act, to swear that the deponent doth not know the *offenders*, (in the *plural*) without adding in the disjunctive, "*or offender.*" (*g*)

As to the *examination* itself, the act merely requires that the principal or servants shall *submit* to the examination of the justice touching the circumstance of the offence. So that although the act is *imperative* as to the *oath* (and which cannot be dispensed with), it is rather for the magistrates to put any other questions, than for the parties to prepare or give in an examination in any certain form. (*h*) However, it will be advisable, as well for the owner and occupier of the house and all servants, to press upon, or at least to tender to the magistrate a full and accurate disclosure and account of the circumstances, and the subscribed forms of *oath*, and *examination* and *recognizance* may be adopted. (*i*) It has been held that the swearing before a justice to a deposition *previously* prepared, is a suffi-

(*f*) *Thurtell* v. *Inhabitants of Mutford*, 3 East, R. 400; *Rex* v. *Bishop's Sutton*, 2 Stra. 1247; *Trimmer* v. *Inhabitants of Mutford*, 6 D. & R. 10.

(*g*) *Lowe* v. *Inhabitants of Broxtowe*, 3 Bar. & Adolp. 550.

(*h*) See Lord Tenterden's observations in *Pellew* v. *Wonford*, 9 B. & C. 131; and *Lowe* v. *Inhabitants of Broxtowe*, 3 Bar. & Adolp. 550.

Suggested form of party's oath of a *partial demolition* of a dwelling-house and of damage to fixtures, furniture and goods.

(*i*) *A. B.* of, &c. maketh oath and saith, that a number of persons, exceeding *twelve* and more, being then and there riotously and tumultuously assembled together to the disturbance of the public peace, did, on the evening of Sunday last, the ninth day of ——, instant, unlawfully make an attack upon the dwelling-house of, and then inhabited by, this deponent, situate in the parish of ——, and within the hundred of ——, in the county of ——, and did then and there unlawfully and *with force* and *feloniously* in part demolish and destroy the same, by then and there unlawfully and *with force and feloniously* breaking —— of the windows, and —— of the window frames thereof, and greatly damaging and injuring the door-way and stone-work and —— shutters of the said dwelling-house, and by then and there, &c. [*here describe very particularly any other act of part demolishing of the dwelling-house*]; and that the same persons so then and there riotously and tumultuously assembled, did then and there unlawfully and with force and feloniously at the same time as aforesaid, greatly damage 20 fixtures, 100 articles of household furniture and 100 other goods of this deponent, then and there being in this deponent's said dwelling-house, contrary to the statute in such case made and provided. And this deponent further saith, that the damage to the said dwelling-house, so caused by the said felony and offence, amounts to the sum of 39*l.* 7*s.* 6½*d.*; videlicet, 33*l.* 16*s.* part thereof for the said damage so done to the said windows, window-frames, shutters, doors, door-way and stone-work, [and the sum of 5*l.* 11*s.* 6½*d.* for boarding up the said broken windows on the following day after the said felony was so committed, to prevent the persons riotously and tumultuously assembled as aforesaid from getting into the said dwelling-house of this deponent.*] And this deponent further saith, that the said damage so feloniously done to this deponent's said fixtures, household furniture and other goods as aforesaid, then and still amounts to the sum of 40*l.* and upwards. And this deponent further saith, that he doth not know the names or name, or the person or persons of or any particulars of or relating to the said persons who so riotously and tumultuously assembled as aforesaid, or either of them; nor doth he know the name or names, or the person or persons, or any particulars of or relating to the said persons who so unlawfully and with force and feloniously so in part demolished his said house as aforesaid and committed the said other damages and offence, or any or either of them. *A. B.*

Sworn at the Police-office in the town and county of the town of Nottingham aforesaid, this 15th day of Oct. 1831, before me, J. H. Barker, Mayor.

* *Semble*, this damage, though included in the oath, is not recoverable under the act.

cient submission to examination within the meaning of the present act, if the justice require nothing further. (*k*)

With respect to the *recognizance*, the party injured and his servant should take care to enter into such a recognizance, as under the terms of the act may be required by the magistrate, and which it should seem must be proved on the trial of an action against the hundred. (*l*)

The eighth section prescribes and gives the form of the *notice*

—— to wit.—The examination of *A. B.* of ——, Esquire, taken upon his submission, and upon his oath, this —— day of ——, A. D. ——, before me, *E. F.* Esquire, one of his Majesty's justices of the peace in and for the county of —— aforesaid, and residing near to and having jurisdiction over the place where the offence hereunder stated hath been committed, and also taken in pursuance of the statute in that case made and provided. — Suggested form of an examination taken before a justice of the peace.

Which said *A. B.* saith, that, &c. Here the substance of the oath as in the above form must at all events be stated, together with his answer to all questions put to him by the magistrate connected with or likely to lead to the discovery and apprehension of the offenders, see sect. 3 of 7 & 8 Geo. IV. c. 31, and id. chap. 30, sect. 8; and Lowe v. *The Hundred of Broxtowe*, 3 Bar. & Adolph. 550. The deposition of the party should be stated as nearly as possible in the very words he has used. Then he should subscribe his name to the deposition, though that is not absolutely necessary.

Taken before me, the day and year above-mentioned. *E. F.*

N. B. The following memorandum may as well be subscribed to the affidavit, and signed by the magistrate:—

Be it remembered, that the above-named *A. B.*, previously to making the foregoing deposition, expressed his readiness and *submission* to my examining him upon his oath touching the circumstances of the said offence, according to the statute in that case made and provided; and then became bound by recognizance before me to prosecute the offenders, when apprehended, in 50*l*. This 15th Oct. A. D. 1831. — Justice's memorandum of a party's readiness to submit to be examined on oath and of his having entered into his recognizance.

City of Coventry, (to wit).—Be it remembered, that on the —— day of ——, in the third year of the reign of our Sovereign Lord William the Fourth, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c. *A. B.* of, &c. ribbon manufacturer and housekeeper, personally came before us, *E. F.* and *G. H.*, Esqrs. two of the justices of our said lord the king, appointed to keep the peace within the said city and county of the same city, and acknowledged himself to owe to our said lord the king the sum of [illegible]. of lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, in case default shall be made in the condition following. — Form of a recognizance to prosecute for such felony in case the offenders should be apprehended.

Whereas divers persons unlawfully, riotously and tumultuously did, on the —— instant, in the parish of ——, in the said ——, assemble together to the disturbance of the public peace; and being so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there unlawfully, feloniously and with force begin to demolish, pull down and destroy, and did feloniously in part demolish, pull down, and destroy and damage a certain dwelling-house of the said *A. B.*, there situate, contrary to the statute in such case made and provided. Now the condition of this recognizance is such, that if the above bounden *A. B.* shall and do prosecute, according to law, the offenders when apprehended for the said offence, then this recognizance to be void.

Acknowledged before us,
E. F.
G. H.

Town and County of the Town of Nottingham, to wit.—Take notice that you *A. B.* are bound in the sum of fifty pounds to prosecute, when apprehended, the person or persons guilty of demolishing or beginning to demolish your house and premises in the said town and county of the town of Nottingham, on the ninth day of October instant. Dated this fifteenth day of October, one thousand, eight hundred and thirty-one. — Form of justice's notice to the party of his having entered into a recognizance to prosecute.

J. H. BARKER, Justice of the Peace.

(*k*) *Lowe* v. *Inhabitants of Broxtowe*, 3 Bar. & Adolp. 550.

(*l*) Noy, 150; 2 Stark. Evid. 679.

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in writing of the claim of compensation according to the annexed schedule when the damages do not exceed *thirty pounds*.

II. Preliminary steps in cases of contracts, after inception of an injury. Notices, demands, &c. in cases of contracts.

II. We have in the last chapter stated some cases of contract, when it is necessary to *perform* a *condition precedent*, give *notice* of an event, or make a *request*, in order to complete a cause of action. There is another instance arising out of a contract, and when the defendant has refused to perform it, in which it may be necessary to make a demand, somewhat resembling that to constitute a conversion, and support an action of trover.

Demand of goods of an infant or married woman.

Thus, if an infant have purchased goods not necessaries, and when applied to for payment they remain in his possession, and thereupon he sets up his infancy, and insists on that account that he is not obliged to pay for them; in such case, the vendor could not sue him upon the contract, but he may demand the goods, and support an action of *detinue* for the recovery of them or their value, and such demand may be in the form subscribed.(*m*) And the same doctrine would, it is assumed, extend to a contract for goods made by a married woman, and afterwards disaffirmed by her husband. (*n*)

Demand to create a forfeiture between landlord and tenant.

In general no actual entry or demand is necessary to take advantage of a forfeiture, (*o*) and by the 4th Geo. 2, c. 28, sec. 2, if half a year's rent be in arrear, and a clause of re-entry has been reserved, and there be no sufficient distress on the premises countervailing the arrears then due, an action of ejectment may be supported *without any formal demand* or entry, although required by the terms of the lease. (*p*) But an eject-

(*m*) *Mills* v. *Graham*, 1 New R. 148; it is advisable to declare in such action in detinue and debt, as defendant may have used some of the goods as necessaries, though purchased for trading, *Turberville* v. *Whitehouse*, 1 Car. & P. 94; and *Maddox* v. *Mills*, 1 M. & S. 738.

(*n*) Co. Lit. 351, b.; *Blackstone* v. *Martin*, 3 Bulst. 308. Thus if a feme covert purchase goods, and her husband deny her authority, and his own liability, a demand should be made; and after evidence of his dissent, the goods may be retaken or recovered; and if wrongfully detained, the same would not afterwards be liable to be taken in execution for a debt of the husband.

Form of notice claiming return of goods from an infant.

Dated, &c.

Sir,—Whereas, on, &c. you obtained from me certain goods, viz. &c. (describing them) under colour and pretence of purchasing and paying for them, on, &c. and you have refused to pay for the same, under the pretence of your being, or having been an infant at the time you obtained the same, and you have refused to pay for the same, or to return them; Now therefore, I hereby demand and require you immediately to pay for the same, or in case you refuse to do so, and that you were or are an infant at the time you obtained the said goods, then I hereby demand and require you immediately to return, and now to deliver the said goods to me, or I shall immediately commence an action to recover the same or their value.

(*o*) *Goodnight* v. *Cator*, 2 Dougl. 477, *ante*, 480, 481, 482, 572, 573.

(*p*) *Doe* d. *Scholefield* v. *Alexander*, 2 Maule & S. 525; *Doe* d. *Lawrence* v. *Shawcross*, 3 B. & Cres. 754; 5 D. & R. 711, S. C.; *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490; 4 D. & R. 45, S. C.; and see Chitty's Col. Stat. 667.

ment founded on that statute cannot be maintained when there is sufficient distress on the premises; (q) and therefore, frequently when there is a clause of re-entry in a lease, in case the rent is not paid within days, or other specified time, after a quarter day, the best course is to proceed at common law, by demanding the exact rent in arrear on the 21st day, for half an hour before sunset, at the door of the demised house, or other most notorious part of the premises, somewhat with the same form as in case of an entry to avoid a fine. (r)

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Notices, &c. in other cases of contracts, and in cases of contracts to indemnify.

The same rules and suggestions should be observed in *all* other cases of contracts, when it may be necessary or expedient to give any notice, or to make any request essential, to be afterwards proved. (s) Where a person is under a covenant or contract for good title, or for quiet enjoyment of sold or demised property, or is under an express or implied contract to *indemnify*, and a claim and proceedings have been instituted at the suit of a third person, against the covenantee or party so indemnified, to recover the estate, or otherwise to affect him, it is expedient and advisable, though *not absolutely necessary*, to give the covenantor notice of the adverse claim and proceedings, and require him to protect the title, and afford means of resisting the claim, or that he will ultimately be sued upon his covenant, and to compel compensation for all loss, damages, expenses, and trouble that the covenantee may sustain. (t) The purpose of giving notice, is not in order to give a ground of action, but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money. (u) In a recent case, where a vendor had conveyed premises to a purchaser, and covenanted for good title, and afterwards an action of formedon was brought against the purchaser by a party having a better title, and the purchaser compromised such suit for 500*l*., it was held that such purchaser, in an action against the vendor for the breach of his covenant for good title, might recover the whole

(q) *Doe* d. *Foster* v. *Wandless*, 7 T. R. 117.

(r) See directions, *ante*, 480.

(s) See the preceding chapter, *ante*, 493 to 499.

(t) *Duffield* v. *Scott*, 3 T. R. 374; *Smith* v. *Compton*, 3 Bar. & Adolp. 407.

(u) *Per* Buller, J. in *Duffield* v. *Scott*, 3 Term Rep. 374; and *per* Parke, J. in *Smith* v. *Compton*, 3 Bar. & Adolp. 408, 409.

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sum so paid, and his costs as between attorney and client in the compromised suit, and this, notwithstanding he had not given notice to the vendor of the suit against him; because in an action on a general guarantee, the only effect of such want of notice to the indemnifying party, is to let in proof on his part, that the compromise was improvidently made, and it lies on him to establish that fact, which was not done in the then present case. (*x*) However, it is usual and proper to give an early notice of the adverse claim, and to advert to the covenant or contract of indemnity, and to require the party to afford evidence and assist in defence of the claim, or that otherwise the party giving notice will suffer judgment by default or resist the claim as he may be advised, and that he will proceed against the party to whom the notice is addressed, to recover indemnification and all costs and expenses that he may sustain, and such notice may be in the subscribed form. (*y*) And although the point has been disputed, (*z*) yet it seems that the party expressly or impliedly indemnified, although it be apparent that the adverse claim is well founded, may nevertheless resist it, especially if it

(*x*) *Smith* v. *Compton and others*, 3 Bar. & Adolp. 407.

Form of notice to an indemnifying party.

(*y*) Sir,—Whereas by an indenture, bearing date, &c., and made between, &c. you conveyed to me an estate and premises, situate, &c., for and in consideration of the sum of —— by me paid to you for the same, and you thereby covenanted that, &c. [*here copy the covenant for good title or quiet enjoyment, or state in like manner the other contract of indemnity express or implied.*] And whereas a claim of the said estate has been made by *E. F.* of, &c., and an action of ejectment hath been commenced and is depending against me by and at the suit of the said *E. F.* for the recovery of the possession of the said estate and premises, [*or whatever else may be the pending proceeding.*] Now, therefore, I hereby require you on or before the —— day of ——, inst., fully, and particularly, and satisfactorily to state to me in writing and otherwise, whether you are in possession of any and what facts or grounds of defence and evidence upon or under which I may be enabled effectually to resist the said claim, and successfully defend the said action, and whether or not it is your wish that I should defend the said action, and on what grounds and evidence; and in default of your compliance with this notice, and your stating and showing to me good and sufficient grounds for defending the said action with success, I hereby further give you notice that in order to avoid the inconvenience and loss that would result from my immediately submitting to the said claim and action, I shall endeavour to resist the same and retain possession of the said estate and premises as long as I may be enabled, or I shall take such proceedings, either by way of compromise, in case the said claim should appear to be well founded, or otherwise, as I may be advised in that behalf, and in case you do not immediately make an acceptable arrangement the whole of the damages, costs and expenses, that I may sustain must be borne and defrayed by you. And that if you require me to defend the said action I expect and require you, from time to time, to supply sufficient money and evidence for that purpose, and further that for whatever trouble, damage, expense or costs, or interest of monies, I shall or may have to bear, or expend, or disburse, I shall hold you responsible, and shall hereafter seek to recover compensation in an action against you upon your said covenant, (or, "contract," *or*, "liability to indemnify me"). Dated, &c.

Yours, &c.

(*z*) *Gillet* v. *Rippon*, 1 Mood. & Malk. 406; *Knight* v. *Hughes*, Id. 247; *Roach* v. *Thompson*, Id. 487; *Spurrier* v. *Elderton*, 5 Esp. R. 1, S. P.; see *Bleaden* v. *Charles*, 7 Bing. 246.

be a debt of magnitude that he could not immediately pay, and he might even delay the payment by bringing a writ of error for delay and yet recover all the costs he may thereby sustain; for a party so indemnified is not to be expected or required to submit to an immediate execution when the party who has engaged to indemnify him neglects to come forward and perform his engagement.(a)

(a) *Smith* v. *Compton*, 3 Bar. & Adolp. 467. According to *Chilton* v. *Whiffin*, 3 Wils. 13; *Sandback* v. *Thomas*, 1 Stark. R. 306; *Sparkes* v. *Martindale*, 8 East, 593; and *Ex parte Marshall*, 1 Atk. 262; Chitty on Bills, 8th ed. 349, even the costs of *a bill in equity*, or *a writ of error for delay*, are recoverable; and see *Taylor* v. *Higgins*, 3 East, 169; *Sparkes* v. *Martindale*, 8 East, 593; *Ex parte Lloyd*, 17 Ves. 254; *Bignall* v. *Andrews*, 7 Bing. 217.

CHAPTER VII.

OF REMEDIES BY ACTS OF PARTIES THEMSELVES WITHOUT ANY ASSISTANCE OF OFFICERS OF THE LAW OR OF LEGAL PROCESS, EITHER TO PREVENT, OR REMOVE, OR ABATE INJURIES, OR TO OBTAIN SATISFACTION; AND OF PARTIES APPREHENDING OFFENDERS, DISTREINING, &c.

I. Of Preventive Measures, without Legal Assistance, in general.
II. Of Defence, Resistance, and Prevention of Injuries in particular.
1. What Defence of *Person*, and to what extent.
1. Against Felonies.
2. Against Misdemeanors and Assaults, &c.
2. What Defence of *Personal Property*.
3. What Defence of *Real Property*.
III. When a Relation, Servant, Friend, or Stranger, may interfere, and how.
IV. Of apprehending Offenders and their Utensils, &c.
1. By Private Individuals.
2. By Constables, &c.
3. Under Warrants, &c.
V. Of Resistance of Process, Escapes, Rescues, Prison-breaking, and Pound-breach.
VI. Of Re-caption of a Relation, or of Personal or Real Property.
1. Of Person of a Relation.
2. Of Personal Property.
1. In general.
2. In case of Fraudulent Purchases.
3. Stoppage in Transitu.
3. Of Real Property.
VII. Of Abatement and Removal of Nuisances and Injuries.
1. Private Injuries.
1. To Persons.
2. To Personal Property.
3. To Real Property.
2. Public Nuisances and Injuries.
VIII. Of Distresses and Seizures.
1. Damage feasant.
2. For Rent, &c.
3. For Poor's Rates, &c.
IX. Of Set-off, even by stratagem, in case of Debts.
X. Setting-off of one Judgment against another.
XI. Of Remedies by Retainer and Lien, &c.

I. Of preventive and other remedies, without legal assistance in general.

IT is proposed in this chapter to consider those preventive and other remedies of which *parties themselves, and their relatives and others*, may avail themselves *summarily*, and without the assistance of the law or its officers, either to *prevent* or *remove injuries*. It is obvious that in many cases the most speedy justice could not adequately supply the absence of such immediate and necessary remedies, nor indeed could the natural impulse of self-defence against sudden and immediate aggressions be restrained. (*a*) The law, therefore, permits parties to adopt certain modes of resistance, and merely interferes to modify and regulate the means to be employed. It has

(*a*) 2 Rol. Ab. 546; 3 Bla. C. 3, 4; and see *per* Littledale, J. in *Cubitt* v. *Porter*, 8 Bar. & Cres. 269.

indeed been observed that laws for prevention of injuries are even better than those for compensation or punishment, (b) for they *prevent* the loss to the individual, and the necessity for suing or prosecuting the wrong-doer, at the risk of his being wholly unable to make compensation still less to reimburse the expenses of legal proceedings. (b) *Preventive remedies* are principally divisible into, *first*, those *by the act of a party himself*, or his relative, or a stranger, without the aid of legal process, or any authorized officer; or *secondly*, they are, by the intervention of some *legal authority* or proceeding, either summary or by more formal proceeding. In the present chapter we will consider the former, and in the next the latter.

We will consider this very important branch of the law, 1st, As relates to the Prevention or Removal of Injuries to the *Person* of the Party himself or his relative; 2dly, As relates to *Personal* Property; and 3dly, As respects *Real* Property.

When a party cannot adopt a preventive remedy and also an action.

But before a party adopt either of these summary remedies, it is essential for him to keep in view the rule to which we have before adverted, viz. that if a party obtain redress by any such summary remedies of his *own*, he is not afterwards allowed to *sue* for the temporary injury, (c) and consequently that if the damages already sustained be considerable, and an adequate object of litigation, it is better to proceed by action. (d) It seems to be settled, at least in the case of a private nuisance, that a party has only an option, and cannot abate it and also sue for damages. (e) But that doctrine must be received with some qualification, for it would not extend to receiving back an apprentice after he had long been detained and voluntarily returned. (f)

Cautions as to the *means* of prevention.

Another caution is essential, namely, that *the means* adopted either by resistance, defence, or re-caption, must always be *proportioned to the occasion*, and that any excess of violence may subject the party to an action; and in case of unjustifiable, or unnecessary, or avoidable homicide, or mayhem, to punishment. These degrees vary according to the subject-matter, and to the felonious or other violence, or improper conduct of the aggressor, and the subject-matter injured or attempted to be injured; thus

(b) *Willcock* v. *Windsor*, 3 Bar. & Adolp. 43; *Veneghan* v. *Attwood*, 1 Mod. 202.

(c) *Ante*, 20.

(d) *Ante*, 20.

(e) *Baten's case*, 9 Co. Rep. 55; 3 Bla. C. 219, 220, and yet this is contrary to the doctrine in *trover*, viz. that the mere restoration of the goods after a conversion only reduces the damages, and does not defeat the right of action. 1 Rol. Ab. 5, pl. 1; *Baldwin* v. *Cole*, 6 Mod. 212; Bul. N. P. 46; Bac. Ab. Trover, D. Accord, &c.; *Wyatt* v. *Blades*, 3 Campb. 396.

(f) See cases in last note.

where a *felonious* attack is made upon the life of another, he may justify every homicide in self-defence, and a woman may justify homicide to prevent a rape; whereas in defence of goods or land against a mere *misdemeanor*, at most a battery would in ordinary cases be justifiable; and a wounding or mayhem, occasioned by the use of a deadly or *dangerous weapon*, would be highly criminal. In all cases where a *private* injury is to be prevented or abated, or the party complaining otherwise acts for himself, it is an established rule that he should do no more than the *necessity* of the case requires when the excess might be in any way injurious to another—a principle which pervades every part of the law of England, *criminal* as well as *civil*, and indeed belongs to all law that is founded on reason and natural equity and justice. (*g*) Supposing, therefore, the assailant should be too powerful to be resisted by ordinary means, the party wrongfully attacked cannot (excepting when his own death, or a felony, may reasonably be expected,) make up for the deficiency of his strength by resorting to *deadly* arms, except to intimidate, but should seek redress by the intervention of peace officers or other legal proceedings.

The *degrees of* force and *modes* to be adopted in resistance or removal of injuries require very particular attention, and should therefore be accurately defined. Many of the oldest cases, and most of the principles applicable throughout this subject, are admirably arranged and commented upon in Mr. East's excellent Treatise on Pleas of the Crown, in regard to criminal, or excusable, or justifiable homicide, and which may be readily applied to minor injuries, committed in defence of person or property; (*h*) for it is obvious that whenever a homicide might be justified or excused, a wounding or less degree of violence would also be legal or excused.

With respect to the *prevention* of injuries by a party's own act, the legal means to be adopted, whether defence of person, personal property, and real property, and whether of house or land, materially differ, as well with respect to the subject-matter expected to be injured, as to the nature of the expected injury. Thus in the necessary or prudent defence of *life*, or the resistance of any *forcible felony*, even the *killing* of another may be justifiable; thus, if an immediate burglary or the burning of an inhabited house be threatened, and reasonably appre-

(*g*) Per Dallas, J. in *Deane* v. *Clayton*, 1 J. B. Moore, 210, 232, 234.

(*h*) 1 East, P. C. title Homicide, 198 to 392, and see id. tit. Mayhem. 392, and tit. Assaults, 406.

hended, the occupier may even kill the aggressor, when, if merely an assault be threatened, or a trespass to land, *mere self* defence or resistance is allowed. (*i*) And the modes and degrees of resistance or prevention must always be proportioned to the nature and value of the property, and the necessity for and propriety of the means of resistance. Lord Coke takes the distinction between the defence of the *person*, and defence of possession of goods or land. In defence of the *person*, even a mayhem, or wounding, may be justified; but in defence of *property*, at most only an assault or battery is legal; (*k*) and in the latter, the form of pleading always alleges that no more damage was done than was necessary for the purpose to be effected. (*l*) We will consider this subject as it relates to, 1. The Person; 2. Personal Property; and 3. Real Property.

II. Of defence, resistance, and prevention of particular injuries.

1. Defence of the person in particular, and when even homicide may be excused.

II. The strongest justifiable act of defence is the *killing* the aggressor, and which of course includes battery, wounding, and mayhem. This is to be considered under two heads, *viz.* 1. Homicide to prevent crime; and 2. Homicide in self-defence. 1. Homicide committed for the *prevention* of any *forcible* and atrocious *crime*, which if completed would amount to *felony*, is *justifiable*; (*m*) and of course under the like circumstance, mayhem, wounding, and battery, would be equally justifiable. (*n*) A man may repel *force* by force in defence of his person, property, or habitation, against any one who manifestly intends or endeavours, by *violence* or *surprise*, to commit a *forcible felony*, such as *murder*, *rape*, *robbery*, *arson*, *burglary*, and the like. (*n*) In these cases he is not obliged to retreat, but may resist, and even pursue his adversary, until he has secured himself from all danger; and if he even kill him in so doing, it is called and considered *justifiable self-defence*; (*n*) and although this was formerly punishable in a degree, (*o*) yet now it is expressly enacted that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, *or*

(*i*) Shaking a man off a ladder, *Collins* v. *Renison*, Sayer, 138; cited in *Gregory* v. *Hill*, 8 Term Rep. 300.

(*k*) 2 Inst. 316.

(*l*) *Bird* v. *Holbrook*, 4 Bing. 633.

(*m*) Braylon, De Jure Goth. l. 3, c. 5; 4 Bla. Com. 180; 1 East, P. C. 271; 1 Hale, 445, 481, 484, 493.

(*n*) 1 East, P. C. 271.

(*o*) 4 Bla. Com. 188; Foster, C. L. 288; 1 East, P. C. 279.

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in his own defence, or in any other manner without felony. (*p*). So if *homicide* be threatened or reasonably expected from hearing a cry of murder in a house, not only the party in danger and his near relations, but any one may interfere to prevent it. Thus, if in any house, the outer door of which is shut, there be a cry by a woman of murder, any person may break open the outer door to prevent it; *per* Rook, J., "It is highly important that bystanders should know when they are authorized to interfere. In this case, the life of the wife was in danger from the act of the husband; the defendants, therefore, were justified in breaking open the house, and doing what was necessary for the preservation of her life." And *per* Chambre, J. "There is a great difference between the right of a private person in cases of intended *felony* and of breach of the peace. It is lawful for any private person to do any thing to prevent the perpetration of a felony."(*q*) But the fear or expectation of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant him in killing that other by way of prevention, for there must be an *actual danger* at the time. (*r*)

There must also be a *felony intended;* for if one came only to *beat* another, or to take his goods merely as a trespasser, though the owner may justify the *beating* of him so far as to make him desist, yet if he *kill* him it is manslaughter; although if the other had come to *rob* him, or take his goods as a *felon*, and were killed in the attempt, it would then be justifiable in self-defence. (*s*) To justify homicide, the *resisted felony* must also have been of a *forcible nature*, or of such extraordinary degree of atrocity as not to allow of any delay; and therefore a party would not be justified in killing another who was merely attempting to pick his pocket;(*t*) though if one has actually picked my pocket, and I cannot otherwise take him, it has been supposed that the killing him to prevent his escape would be justifiable, for it is said this falls under the general rule concerning the arresting of felons. (*u*). Mr. Justice Blackstone also insists, that killing a person who attempts to break open

(*p*) 9 Geo. 4, c. 31, s. 10; see the section, *post*, 592, note (*k*).

(*q*) *Handcock* v. *Baker and three others*, 2 Bos. & Pul. 260.

(*r*) 1 East, P. C. 271, 272.

(*s*) 1 Hale, 485, 6; 1 East, P. C. 272.

(*t*) 4 Bla. Com. 180; 1 East, P. C. 273.

(*u*) See *post*, sect. iv., as to apprehending offenders without warrant. But this doctrine may on principle be questioned, as the utmost punishment even of the law would not in such a case have been *capital*.

any house in the *day time* is not justifiable; but he adds this qualification, "unless the act was accompanied with an attempt of robbery;"(x) but although such attempt were committed in the *day time*, yet if accompanied with *any* felonious intent, the killing would in point of law be justifiable homicide. (y)

If the party killing had ***reasonable grounds*** for believing that the person slain at the time had a felonious design against him, and under that supposition killed him, although it should afterwards appear that there was no such design, it will only be manslaughter, or even misadventure, according to the degree of caution used, and the probable grounds for such belief. (z) As where a sheriff's officer early in the morning pushed abruptly and violently into a gentleman's chamber in order to arrest him, not telling his business, nor using words of arrest, and the gentleman, not knowing that he was an officer, under the first surprise snatched down a sword and instantly stabbed him, this was holden to be only manslaughter. (a) And where a servant had recently introduced a person into her master's house, and afterwards the master, reasonably supposing that thieves were in the house, went down stairs, and the deceased hid himself in the buttery, and the master entered the same in the dark thrusting his sword before him, and killed him, this was ruled to be misadventure, and *justifiable*. (b) So if a violent assault and battery be committed by a person at the *same time* possessed also of a sword, which he drew as with intent to use it, and without any words of warning, the person assaulted having reasonable ground for fearing his life in immediate danger, may justifiably in self-defence throw a dangerous instrument, as a bottle, and kill him, to prevent the expected felony; (c) for in these cases, where an immediate personal injury endangering life is threatened, a party is justified in *immediately* killing the assailant, who might otherwise, in case of any delay, destroy the party attacked. (c) So where a *felonious* attack has been made upon the life of another, the latter, in self-defence or protection, may justify the *pursuit and killing* of the aggressor, until he himself is entirely out of danger, which he cannot be said to be so long as the assailant might immediately renew his attack. (d)

(x) 4 Bla. Com. 180.
(y) 1 East, P. C. 273; *Cooper's Case*, Cro. Car. 544.
(z) 1 East, P. C. 273.
(a) 1 Hale, 470; Fost. 299; and yet it has been observed that he ought first to have demanded his business, 1 East, P.C. 274.
(b) *Levet's Case*, Cro. Car. 538; 1 Hale, 42, 474; Foster, 299; 1 East, P. C. 274, 275.
(c) 1 East, P. C. 276.
(d) *Maugridge's Case*, 9 State Trials, 63; 1 Hale, P. C. 278.

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But if it be clear that the offence committed or about to be committed did not amount to felony, and at most to an *indictable misdemeanor*, then no one can legally use a *dangerous weapon* either to wound or secure the offender. Thus to assume the appearance of a ghost and thereby even to frighten others and so work on their imaginations as to occasion death, or to call the feelings into such strong excitement as to produce a fatal malady, though a criminal misdemeanor, is not *felonious*; (*e*) and therefore where a person shot at and killed a party who before and at the time had assumed such appearance, it was held *murder*. (*f*)

The law justifies a woman killing one who attempts to ravish her. (*g*) And the husband or father may justify killing a man who attempts a rape upon his wife or daughter, though not if he take them in adultery by consent, for the one is forcible and felonious but not the other. (*h*) And Mr. Justice Blackstone expressed his opinion that the forcibly attempting an unnatural offence might be equally resisted by the death of the aggressor. (*i*)

2dly. *Self-defence when no felony was intended or apprehended.*—We are here to suppose that there has been no threat or apparent intention on the part of the assailant to affect the *life* of the party attacked or to commit any *forcible felony*. The defence in these cases is of two descriptions—1st. Where the assailant attempts to beat another and there is no mutual combat. 2dly. Where there is a mutual combat arising from sudden quarrel without prepense malice. With respect to the *first*, or self-defence, if the death of the assailant or lesser injury ensue, without fault of the party attacked, he is wholly dispunishable. (*k*) The defence of one-self, or the mutual or re-

(*e*) 1 Hale, 429; 4 Bla. C. 197, note 17; Id. 201, note 25.

(*f*) 4 Bla. C. 201, note 25. Francis Smith was indicted for murder at the Old Bailey Sessions, January 13, 1804. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun with intent to apprehend the person who personated the ghost; he met the deceased, who was dressed in white, and immediately discharged the gun and killed him. Chief Baron Macdonald, Mr. J. Rooke and Mr. J. Lawrence were unanimously of opinion that the facts amounted to the crime of murder. For the person who represented the ghost was only guilty of a misdemeanor (a nuisance), and no one would have had a right to have killed him even if he could not otherwise have been taken. The jury brought in a verdict of manslaughter, but the Court said they could not receive that verdict, if the jury believed the witnesses, the prisoner was guilty of murder; if they did not believe them, they must acquit. Upon this they found a verdict of guilty. Sentence of death was pronounced, but the prisoner was reprieved.

(*g*) 4 Bla. C. 181; 1 East, P. C. 271.

(*h*) 1 Hale, 485; 4 Bla. C. 181.

(*i*) 4 Bla. C. 181.

(*k*) 9 Geo. IV. c. 31, s. 10, which enacts that "*no* punishment or forfeiture shall be incurred by any person who shall kill another *by misfortune or in his own defence*, or in any other manner without felony."

ciprocal defence of such as stand in the relations of husband and wife, parent and child, and master and servant, is sanctioned by law. In these cases, if the party himself or any of these his relations be *forcibly* attacked in his person or property, it is lawful for him to repel force by force, for the law in these cases respects the passions of the human mind, and makes it lawful in him, when *external violence* is offered to a man himself or those to whom he bears so near a connection, to do that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. (*l*) It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted to man immediately to oppose one violence with another. But care must be taken that the resistance does not exceed the bounds of mere defence and prevention, for if it do, then the defender himself would become an aggressor. (*m*) The battery in defence of self or a relation must be such only as is necessary for the preventing *future* purpose; for if it were excessive the prior assault will be no justification; thus a man cannot justify a mayhem for every assault, as if *A.* strike *B.*, the latter cannot justify drawing his sword and cutting off *A.*'s hand. (*n*) But if the first assault be very violent, continued by means either actually or apparently to the assailed party putting his *life* in danger, then even a mayhem may become justifiable or be excused. (*o*) So no man is required to remain defenceless and suffer another to beat him as long as he pleases without resistance, although it is evident that the other did not aim at his *life, but he may lawfully exert so much force as is necessary to compel him to desist.* It is not unlawful for a man to strike and beat with or use whatever force may be sufficient to prevent another from beating him (short of *intentionally wounding or killing him,* unless for the necessary preservation of his own life,) provided he cannot escape from the blows by any other less violent means, and did not bring upon himself such ill-treatment by his own illegal act. (*p*) And therefore it should seem that under such circumstances, if the stroke in self-defence be not given by a dangerous or improper weapon of defence, and death should unfortunately and accidentally ensue from

(*l*) 2 Rol. Ab. 546.
(*m*) 2 Rol. Ab. 546; 3 Bla. C. 3, 4.
(*n*) *Cook* v. *Beal*, 1 Ld. Raym. 177; Bul. N. P. 18.
(*o*) *Butler* v. *Austin*, 1 Rol. Rep. 19; *Dance* v. *Lucy*, Sid. 246; *Newman* v. *Smith*, 2 Salk. 642; 3 Id. 46, S. C.
(*p*) 1 East, P. C. 272, 286, 287.

such mere self-defence, (and not from retaliation or after the assault was over, which is scarcely ever excusable,) (*q*) such death would be attributed to misadventure or misfortune and not punishable, being unintentional in the party striking, who was in that instance doing no more than he lawfully might. (*r*) It seems that the mere offer of a person to strike another is sufficient to justify the latter's striking him first, for he need not wait till the other has actually struck him. (*s*) It has been reported to have been resolved, that when a person is assaulted or beaten in a church or church-yard, it is not lawful for him to return blows in his own defence as he may elsewhere. (*t*) But at least as to the latter such a decision appears scarcely reasonable. (*t*)

But in cases of mere assault and battery, where the *life* of a party is not in danger, however unjustifiable the conduct of the assailant may have been, *no dangerous instrument* or means of defence, such as a sword, or knife, or a loaded pistol, should be even produced, except to intimidate, much less should be used; and if used, and the death of the assailant should ensue, the party killing will at least be guilty of manslaughter. (*u*) Therefore where a violent assault and battery were plainly intended merely *to chastise* the party for his supposed misbehaviour, and there appeared no intent to affect his *life*, his killing the assailant with *a knife* was holden not to be lawful or excusable under the plea of self-defence, but amounting at least to manslaughter. (*x*) And if *A.*, *without any weapon*, strike *B.*, and *B.* retreat to a wall and then stab *A.*, that will be manslaughter, for it cannot be inferred from the bare act of striking *without any dangerous weapon*, that the intent of the aggressor was to kill the party stricken. And *without* there be a plain manifestation of that or some other felonious intent, no assault however violent will justify killing the assailant. (*y*) So where a dispute had arisen relative to the payment of the rent of a house, and after a good deal of discussion, in the course of which the plaintiff had made use of some irritating expressions and had given the defendant a slight blow on the shoulder with his fist, and thereupon the latter took up a heavy bar of iron, weighing at least 20 lb., and struck the plaintiff a severe blow upon the

(*q*) *Barfoot* v. *Reynolds*, 2 Stra. 953.

(*r*) *Nailor's case*, 1 East, P. C. 286, 287; it is there put doubtfully, but the law seems clearly so.

(*s*) Bull. N. P. 18; 2 Roll. Ab. 547, l. 37.

(*t*) *Francis* v. *Ley*, Cro. J. 367; Hawk. P. C. c. 23, s. 28; see 5 & 6 Edw. VI. c. 4, s. 2, as to striking, &c. in church or church-yard.

(*u*) *Nailor's case*, 1 East, P. C. 285, 286, 287, 276, 277; Bull. N. P. 18; *Cook* v. *Beal*, 1 Ld. Raym. 177.

(*x*) *Nailor's case*, 1 East, P. C. 276, 277.

(*y*) *Nailor's case*, 1 East, P. C. 276, 277, 273; 1 Hale, 484.

head, by which he was knocked to the ground and his life put in danger; it was held in the Scotch court that, although the plaintiff was the first aggressor, yet the slight blow which he had given could not justify the violent assault which was made in return, and that therefore the plaintiff was entitled to the recovered damages of 150*l.*, besides the amount of the surgeon's bill and expenses; and upon an appeal the House of Lords affirmed such decision; (z) and upon the same principle it has been held, that in answer to a plea of justification in defence of possession, it may be replied and proved that the battery was excessive. (*a*)

The cases of illegal arrest, or attempts to arrest a party under an illegal writ or warrant, or to break open an outer door, where the assailant was killed, and which will hereafter be fully noticed, are of this nature, for the party intended to be arrested knew that the aggressor meant only an illegal imprisonment and not an attack upon his life or other felony, and therefore he was guilty of manslaughter in shooting the aggressor, though he was acting manifestly unlawfully. (*b*)

In no case is the proof of a plaintiff's first assault in support of a plea of *son* assault demesne any excuse, if the retaliation by the defendant were excessive and bore no proportion to the necessity or to the provocation received. (*c*) In short, the *extent of the means of self-defence* depends on the occasion, and though it is not necessary or usual to plead that the defendant gently laid hands on the plaintiff to prevent his attack, yet the battery and resistance can no longer be used than whilst necessary to prevent the aggressor from repeating or renewing his attack at or about the same time; and if in self-defence there be an unnecessary or excessive wounding or battery more than necessary to resist the assailant, and prevent or disable him from further injury, the defendant himself will be liable to make compensation for his excess, (*d*) or may be otherwise punishable. (*e*) The plea justifying a battery or wounding in self-defence, must be that the plaintiff assaulted the defendant and *would* have (not *had*) beat and illtreated the defendant if he had not immediately defended himself against the plaintiff, and that therefore he did so defend himself and *in so doing* com-

(z) *Dowse* v. *Douglass*, 1 Shaw's Rep. 125.

(*a*) *King* v. *Tebbart*, Skin. 387; *Searle* v. *Darford*, Lutw. 1436; *post*, 600, n. (*p*).

(*b*) *Capt. Nestor's case*, *ante*, 34, n. (*m*); and *post*, as to resistance of illegal process.

(*c*) 1 East, P. C. 406.

(*d*) *Newman* v. *Smith*, 2 Salk. 642; *Cook* v. *Beal*, 1 Lord Raym. 177; Bul. N. P. 18; *Dale* v. *Wood*, 7 Moore, 33; Gilb. C. P. 154; *Weaver* v. *Bush*, 8 T. R. 81.

(*e*) 1 East, P. C. 293.

mitted the battery and trespasses complained of; (e) and upon the traverse of such plea, or at all events upon a new assignment, (f) the jury will have to determine whether more violence was committed or continued by the defendant than was proper in self-defence; considering however that the aggressor made the first wrongful attack, and rendered defensive measures necessary, and excited the heat and resentment of the other, the degree of violence in self-defence will not be very nicely weighed and will in general be excused by a jury, unless the defendant has improperly and without reasonable fear of his own life being in danger, used dangerous weapons and has attacked the assailant when all occasion for forcible measures of defence has ceased.

Much less, as observed by Blackstone, will the natural right of defence imply or permit a right of attacking or retaliating; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice, either for sureties of the peace or by action or other proceedings for compensation; and they therefore cannot legally exercise this right of *preventive* defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. (g) It is not every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happen accidentally without any cruel or malignant intention, or whilst the blood was heated in the scuffle; but it must appear that the assault was in some degree proportionable to the mayhem. (h)

Secondly, *mutual combat* upon *sudden quarrel*. With regard to homicide in self-defence, where no felony was intended by the party killed, this occurs when death ensues from a combat between parties on a *sudden* quarrel and not premeditated. (i) When it is *premeditated*, as in the case of *agreed duels*, it is murder, (k) or if on an agreed boxing-match, it is at least manslaughter. (l) In order to reduce the offence from manslaughter to *self-defence upon chance medly* (now dispunishable, not even nominally,) (m) it is incumbent on the party to prove two things,

(e) See Pleas, Co. Ent. 644; 2 Saund. 5; Winch, 1121; Pleaders' Assist. 447; 1 Russ. C. L. 150; 2 Id. 56; Trem. 269, 270; Com. Dig. Pleader, 3 M. 15.

(f) Whether a special replication is necessary or not, see 1 Chit. Pl. 625, n. (a); *post*, 600, n. (p).

(g) 4 Bla. C. 184, 186.

(h) 1 East, P. C. 402; 1 Burn's J. 273; 3 Burn's J. 714.

(i) 1 East, P. C. 279; 4 Bla. C. 184.

(k) *Rex* v. *Phillips*, 6 East, 464; 1 East, P. C. 283, 284.

(l) *Hunt* v. *Bell*, 1 Bing. Rep. 2; 4 Bla. C. 183; *Rex* v. *Perkins*, 4 Car. & P. 537; *Rex* v. *Bellingham*, 1 M. & R. M. C. 127; *ante*, 36, n. (g).

(m) 9 Geo. 4, c. 31, s. 10, *ante*, 34, n. (n).

1st, that before a mortal stroke given he had declined any further combat, and had retreated as far as he could with safety; and 2dly, that he then killed his adversary through mere necessity, in order to avoid his own immediate death.(n)

With respect to defence against an attack of *animals*, if a dog, accustomed to bite mankind, attack a party, he may in self-defence shoot him, but only whilst in impending danger from the attack and not afterwards.(o)

If two persons be by misfortune in peril of life one may, if essential, adopt means to preserve his own life, though it will probably occasion the death of the other; as where two persons having been shipwrecked and getting on the same plank, which was not sufficient to save both, one may thrust the other from it though he be thereby drowned.(p)

2dly. Defence of *Personal Property.*

2dly. A man may repel force by force in defence of his *Personal Property*, and even justify homicide against one who manifestly intends or endeavours, by *violence* or surprise, to commit a *known felony*, as robbery;(q) but as we have seen homicide cannot be justified in preventing a mere pickpocket, because that is not a *forcible* felony.(r) If a party come merely as a *trespasser* without any colour to take the goods of another, it is lawful to exert such force against him (even without previous request to restore the goods) as may be necessary to make him desist.(s) And a party may justify even a *battery* by showing that he committed it to restrain the aggressor from taking or destroying his goods,(t) or from taking or rescuing cattle or goods in his custody upon a distress,(u) or to retake personal property illegally taken away or detained.(x) But in so doing, no unnecessary degree of force should be used, for otherwise if the aggressor be killed it would be manslaughter,(y) or even murder, if a deadly or dangerous weapon were used.(z)

A man cannot justify *maiming* another in defence of his possession, but only in defence of his *person*. This restriction however cannot be intended to extend to cases where a man defends himself against a *known felony*, threatened to be committed with *violence* against his property.(a) Lord Coke

(n) 1 East, P. C. 279, 280.
(o) *Clarke* v. *Webster*, 1 Car. & P. 106.
(p) 1 East, P. C. 294.
(q) 1 East, P. C. 271 to 273.
(r) *Ante*, 590, n. (t); 1 East, P.C. 273.
(s) 1 Hale 473 to 486; *Green* v. *Goddard*, 2 Salk. 641; 1 East, P. C. 272, 288, 289; *Regina* v. *Mawgridge*, Kelinge, 132, cited in *Bird* v. *Holbrook*, 4 Bing. 628.
(t) 2 Rol. Ab. 549, b., 7.
(u) Id. L. 10; 2 Bro. Ent. 260.
(x) *Higgins* v. *Andrews*, 2 Rol. Rep. 56; *Masters and Poolie's case*, Id. 208; *Weaver* v. *Bush*, 8 T. R. 78.
(y) 1 East, P. C. 272.
(z) Id. 288.
(a) Id. 402.

CHAP. VII. REMEDIES BY PARTIES, &c.

states the distinction between the defence of the person and defence of the possession of goods or land, and that in defence of the former a mayhem or wounding may be justified, but only an assault and battery in defence of property; (*b*) and the plea in the latter should allege that no more damage was done than was necessary for the purpose to be effected. (*c*)

The 7 & 8 Geo. 4, c. 29, s. 63, and 7 & 8 Geo. 4, c. 30, s. 28, authorize the owner of personal or real property "about to be stolen, or illegally taken, or wilfully injured, and his servants, or any person authorized by him, to apprehend the offender *found committing* the offence," and it has been decided under the former enactment, that if the servant of the owner of property find a party actually committing an offence under that act and apprehend him, and whilst taking the offender to a magistrate such party kill him, this will be murder; but that if the servant either did not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, the resistance would not be murder. (*d*) So as in the case of self-defence it is not lawful to repeat or make any blows after the wrongful attack is ended; so in defence of personal property it is not justifiable to do any act which can no longer be of utility; and therefore where a defendant in pleading justified *shooting a dog* because the dog was worrying his *fowl* and could not otherwise be prevented he must prove that the dog was in the act of worrying the fowl at the very moment he shot him; and therefore where the shooting of the dog having been proved, the defendant's counsel said he should prove that just before the dog was shot, he being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired; Lord Ellenborough said this would not make out the justification, as it was necessary, to justify the shooting, to aver and prove that the dog was, at the time of shooting, *in the very act of killing the fowl* and could not be prevented from effecting his purpose by any other means; (*e*) and where the owner of sheep which *had been* worried by a dog, shot the dog when in *another field*, and after the worrying was over, it was held that this was illegal, as not done in protection of his property. (*f*)

(*b*) 2 Inst. 316.
(*c*) *Bird* v. *Holbrook*, 4 Bing. 633.
(*d*) *Rex* v. *Curran*, 3 Car. & P. 397.
(*e*) *Janson* v. *Brown*, 1 Campb. 41; 1 Carring. Rep. 106; *Wells* v. *Head*, 4 Car. & P. 568.
(*f*) *Wells* v. *Head*, 4 Car. & P. 568; and see *ante*, 593, 594, as to the illegality of continuing defence after the necessity has ceased.

3. Defence of *Real Property*.

3. With respect to the defence or protection of the possession of *Real Property*, although we have seen that it is *justifiable* even to kill a person in the act of attempting to commit a *forcible felony*, as burglary, housebreaking, arson, or riotous demolition of a *house*, since such offences endanger also the person of the occupier; (*g*) yet this is is only when the party in possession is wholly without fault; therefore, where *A.*, with many others, had, on pretence of title, *forcibly* ejected *B.* from his house, and *B.* on the third night returned with several persons to re-enter, and one of *B.'s* friends attempted to fire the house, whereupon one of *A.'s* party shot one of *B.'s*—this was held manslaughter in *A.*, because his entry and holding with force was illegal; though, if *A.* had been in possession by lawful means, the killing, in resistance of arson, would have been justifiable. (*h*)

When a forcible attack is made upon a dwelling-house of another, *without any felonious intent*, but barely to commit a *trespass*, although it is in general lawful to oppose force by force when the former was clearly illegal, (*i*) yet great caution must be observed; for before a person turns out or excludes another from entering a particular house or room, he must be well assured that himself has a *better right* to the possession than the party to be excluded, and that the latter has no right to be present; and therefore, if the exclusion be from a vestry-meeting, it must be certain that the meeting was duly holden.(*k*) In all these cases also much caution must be observed in the *modes of resisting* the intruder or in turning him out; (*l*) for if there be any excess, the party guilty of it may be liable to an action and to criminal punishment; and in answer to a plea justifying a battery in defence of possession, the plaintiff may reply and prove that the battery was excessive; (*m*) as if a trespasser being upon a ladder the occupier shake him off, and in the fall the plaintiff break his leg; (*n*) and a plea of *moliter manus imposuit*, in order to turn the plaintiff out of the defendant's house, where he continued against his will, is no answer to a charge against the defendant of striking the plaintiff repeated blows, and with violence several times knocking

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(*g*) *Ante*, 589; 1 East, P. C. 271, 287.

(*h*) *Case of Drayton Basset*, 1 Hale, 410, 441; 1 East, P. C. 259, 277.

(*i*) *Weaver* v. *Bush*, 8 T. R. 78.

(*k*) *Dobson* v. *Fussey and others*, 7 Bing. 305.

(*l*) *Cook's case*, 1 East, P. C. 287; Cro. Car. 537, S.C.

(*m*) *King* v. *Tebbart*, Skin. 387; *Searle* v. *Darford*, Lutw. 1436; *Gregory* v. *Hill*, 8 Term Rep. 299; *Johnson* v. *Northwood*, 1 J. B. Moore, 420.

(*n*) *Collins* v. *Kenison*, Sayer, 138, cited in *Gregory* v. *Hill*, 8 T. R. 300.

him down; (o) and in trespass, for throwing water over the plaintiff and her apartment, it is no plea that she was endeavouring to obstruct the defendant's ancient window, and that he threw the water to prevent her from so doing. (p) So if *A.* in defence of his house kill *B.*, when he was only a *trespasser*, and endeavouring to make an unlawful entry, it is at least manslaughter, unless there were danger of *A.'s* life. (q) So where the prisoner, an officer in the army, shot a sheriff's officer whilst illegally breaking open an outer door of the prisoner's house to arrest him, he was convicted of manslaughter and sentenced to be transported for life, because the illegal act of the officer was a mere trespass. (r) But if *B.*, in the before-mentioned case, had entered the house, and *A.* had gently laid his hands upon him to turn him out, and then *B.* had turned upon him and assaulted him, and *A.* had killed him, (not being otherwise able to avoid the assault, or retain his lawful possession) it would have been justifiable in self-defence; and so it had been if *B.* had entered upon him and assaulted him first, though his entry were not with intent to murder him, but only as a trespasser to gain the possession. In such case, *A.* being in his own house, need not fly as far as he could, as in other cases of self-defence, for he of right had the protection of his house to excuse him from flying, as that would be to give up the possession to his adversary; but in these cases it is said the homicide is rather *excusable* than justifiable. (s) On the other hand, if the owner of a house be killed in a struggle between him and those who unlawfully resist his turning them out of his house, when they had no right to remain there, it will be murder. (t)

So, if one enter into my *land* without more than implied force, or what has been termed force *in law*, "I must first *request* him to depart, before I can lay hands on him to turn him out, and if he refuse, I (the occupier) can only justify so much force as is necessary to remove him, and should first endeavour to lay hands on him *moliter*, and if he persist in continuing on the land, then *gently* to push him out, and if he do not then depart, I may then beat him, and if he be too powerful, then I (the

(o) *Gregory* v. *Hill*, 8 T. R. 299; and see *Johnson* v. *Northwood*, 1 J. B. Moore, 420.

(p) *Simpson* v. *Morris*, 4 Taunt, 821. In a *civil* action in general, the *excess* should be *replied specially*; *Dale* v. *Wood*, 7 J. B. Moore, 33; *Sayer* v. *Rochford*, 2 Black. 1165; *Gale* v. *Dalrymple*, 1 Car. & P. 381; 1 Ry. & M. 118, S. C.; *per* Abbott, J.

(q) 1 Hale, 445, 485; *Cooke's case*, Cro. Car. 537; 1 East, P. C. 287.

(r) *The King* v. *Nestor*, at Hertford, A. D. 1817, *coram* Best, J.

(s) 1 East, P. C. 287; Hawk. b. 1 c. 28, s 23.

(t) *Rex* v. *Willoughby and another*, 1 East, P. C. 288.

occupier) must not use a dangerous weapon, but must first call in aid other assistance."(x) But in *burglary*, or *forcibly breaking* open a door or gate, it is lawful at once to oppose force to force; and if one break down the gate and come into my close *vi et armis*, I need not first request him to be gone, but may lay hands on him immediately, and turn him out; so if one come forcibly and take away my goods, I may immediately oppose him, for there may be no time to make a previous request, and if the owner be assaulted or beaten, he may, under circumstances, justify a wounding or mayhem in self-defence. (x) This distinction between an entry with *actual* force, and an entry only with *implied* force, with regard to a trespass on *land*, was laid down in an old report, and confirmed in subsequent cases; (y) and the distinction more strongly applies to an entry into an *house*. (z) If a person enter a church or a house and make a disturbance or noise there, he may be removed, but after he has been turned out, a subsequent imprisonment cannot be justified, unless the wrong-doer be guilty of a breach of the peace in view of a peace officer, and be taken by him before a justice on that account. (a)

It is a common doctrine that a party may justify a *battery*, by showing that he committed it in defence of his possession, as for instance to remove a trespasser out of his close or house, (b) or to prevent him from entering it, (c) or to restrain him from taking or destroying his goods, (d) from taking or rescuing cattle or goods in his custody upon a distress, (e) or to retake personal property improperly detained or taken away. (f) But the term *battery* must here be limited to only that degree of violence, and the use of such weapons only that may be absolutely essential to effect the object, and no more.

(x) *Per cur.* *Green* v. *Goddard*, 2 Salk. 641; *Weaver* v. *Bush*, 8 T. R. 78, 357; 2 Rol. Ab. 548, l. 35, 45; *Tully* v. *Reid*, 1 Car. & P. 6; and see *per* Best, J., in *Ilots* v. *Wilkes*, 3 Bar. & Ald. 304; *Bird* v. *Holbrook*, 1 Moore & P. 607; 4 Bing. 628, S. C.

(y) *Green* v. *Goddard*, 2 Salk. 641, and other cases last note.

(z) *Tully* v. *Reed*, 1 Car. & P. Rep. 6; *Searle* v. *Darford*, Lutw. 1435; Hard. 358, S. C.

Tully v. *Reed*, 1 Car. & P. 6. This was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue, and a special plea of *moliter manus imposuit.*

Evidence was given of the assault on the part of the plaintiff, and evidence in support of the special plea was given on the part of the defendant.

Park J. laid it down as clear law, that if a person enters another's house with force and violence, the owner of the house may justify turning him out, (using no more force than is necessary,) without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out, without a previous request to depart. Verdict for the defendant.

(a) *Williams* v. *Genister*, 2 B. & C. 699; 4 D. & R. 217, S. C.; *Price* v. *Severn*, 7 Bing. 316.

(b) *Searle* v. *Darford*, Lutw. 1435; Hard. 358; *Tully* v. *Reed*, 1 Car. & P. 6.

(c) 2 Rol. Ab. 548, l. 25.

(d) Id. ibid.

(e) Id. l. 10; 2 Bro. Ent. 260.

(f) *Higgins* v. *Andrews*, 2 Rol. Rep. 56; *Masters and Poolie's case*, Id. 208; *Weaver* v. *Bush*, 8 T. R. 78.

In general, when the *trespass* is barely against the *land* of another or the property thereon, the law does not admit the force of provocation sufficient to warrant or excuse the owner in making use of any *deadly or dangerous weapon;* as if upon the sight of one breaking his hedges, the owner take up an hedge stake, and knock him on the head, and kill him, this would be *murder*, because it was an act of violence much beyond the proportion of the provocation; and still more where such or the like violence is used after the party has desisted from the trespass; but if the beating (though unlawful at all) were with an instrument or in a manner not likely to kill or wound, it would only amount to *manslaughter;* and it is even *lawful* to exert such a degree of force against a trespasser, who comes without any colour to take the goods of another, as is necessary to make him desist. (*g*) Lord Coke, as has already been observed, takes the distinction between the degree of force that may be used in defence of the person and in defence of goods or land; in the former, a mayhem or wounding may be justified, but in the latter only an assault and battery. (*h*)

It was recently held that a person set to watch a yard or garden is not justified in shooting one who comes into it in the night time, even if he should see him go into his master's hen-roost, for he was not in the actual commission of a felony; but that if, from the conduct of the party, he have fair ground for believing *his own life* in actual and immediate danger, he might then be justified even in shooting him. (*i*) And we have seen, that if a stranger, having entered without any felonious design, conceal himself in an house at night, and there be an alarm of thieves, the occupier will be wholly excused in killing him, upon the supposition that he was a thief. (*k*) If a party be seen entering an out-house at night, with intent to commit a felony, and the owner immediately afterwards apprehend him concealed in a neighbouring garden, with a drawn sword in his hand, and the offender cut and wound the owner, it was held that he was guilty of a felonious cutting under Lord Ellenborough's Act. (*l*) But the throwing down a ladder upon which a mere trespasser is standing on the land of another, is not justifiable, and therefore, where the defendant to an action

(*g*) 1 East, P. C. 288, 289; Fost. 291; 1 Hale, 473, 486. See *Simpson* v. *Morris*, 4 Taunt. 821; *ante*, 600, n. (*p*), as to the illegality of throwing water over a party attempting to obstruct an ancient light.

(*h*) 2 Inst. 316.

(*i*) *Rex* v. *Scully*, 1 Car. & P. 319.

(*k*) *Levet's case*, Cro. Car. 538; 1 Hale, 42, 474; 1 East, P. C. 274.

(*l*) *Rex* v. *Howard*, Car. Crim. L. 231, 333; Ry. & M. C. C. 207, S. C.

of trespass, for shaking plaintiff from a ladder and breaking his leg, pleaded that the ladder and the plaintiff were wrongfully on his land, and that he *gently shook the ladder*, and the plaintiff thereby fell and broke his leg, upon demurrer Denison, J. said, as only the ladder was in the present case *damage feasant*, it was no more lawful to throw this down whilst the plaintiff was upon it, than it is to distrain a horse *damage feasant* whilst a man is upon the horse's back, which is illegal. (*m*)

So, though it is legal, after a civil request to depart, to push or pull a trespasser from a messuage or land, (*n*) yet all force, and particularly imprisonment without warrant, must cease immediately that object has been effected, or the occupier and others assisting him will be trespassers; as where the plaintiff irreverently made a disturbance in a church during divine service, and the defendant, a constable, took him out of the church, and continued to detain until the sermon was over, it was held that the latter imprisonment was illegal. (*o*) So, where the plaintiff had violently entered a public house after the proper hours, and the defendant sent for a constable, and forced him out, but also subsequently detained him, it was held, that as the constable had no view of a breach of the peace, and the plaintiff had not committed *a felony*, the imprisonment was illegal. (*p*)

What *preventions* may be placed *upon* land to prevent trespasses; and what notice must be given.

With respect to the *Prevention* of Trespasses on *Land*, the general rule is, that as far at least as civil rights are concerned, every man may guard his own land from trespasses and encroachments by any means he pleases, provided he do not thereby invade or interfere with the rights of others; (*q*) and although it is another maxim that he must so use his own as to do no harm to others, that only means no harm to their *legal* rights, and subject to that qualification, he may occupy or use his own land as he pleases. (*r*)

So every person has a right to keep a *dog* for the protection of his house and yard, and for that purpose may let it loose *at night*, and if a person incautiously go into the yard after it has been shut up, and he be hurt, he has no remedy. (*s*) But if

(*m*) *Collins* v. *Renison*, Sayer's Rep. 138, cited in *Gregory* v. *Hill*, 8 T. R. 300.

(*n*) *Green* v. *Goddard*, 2 Salk. 641; *Weaver* v. *Bush*, 8 T. R. 78.

(*o*) *Williams* v. *Genister*, 2 Bar. & Cres. 699; 4 Dowl. & R. 217, S. C.

(*p*) *Rose* v. *Wilson*, 1 Bing. 353; 8 J. B. Moore, 362, S. C.; and see *Fox* v. *Gaunt*, 3 Bar. & Adolp. 798; *post*, 619, of apprehending offenders.

(*q*) *Per Gibbs, J.* in *Deane* v. *Clayton*, 1 J. B. Moore, 241.

(*r*) Id. 242.

(*s*) *Pocock* v. *Copeland*, 1 Esp. R. 203; *Deane* v. *Clayton*, 1 Moore, 209, 225, 245; *Bird* v. *Holbrook*, 4 Bing. 642; *M'Kone* v. *Wood*, 5 Car. & P. 1, *post*.

the owner knew the dog to be ferocious, and leave his yard gate open, he must not let the dog loose in the day time, or let him have a chain so long as to be able to reach and hurt a person entering the yard, and he should give a verbal, or written, or printed caution against coming too near, or he will be liable for any damage. (t) In one case it was held, that where a fierce and vicious dog is kept chained for the defence of premises, and any one incautiously or not knowing of it should go so near as to be injured by it, no action can be maintained by the person injured, though he was seeking the owner, with whom he had business. (u) In a still later case it was held that a person is not entitled to recover compensation for an injury received from the bite of a dog placed in a yard for the protection of outhouses, unless he had such reasonable and justifiable cause for being in the place where the dog was as might be pleaded in answer to an action of trespass. But that if he had such cause, the circumstance of there being a notice on a board, in large letters, warning persons to "*beware of the dog*," will not be an answer to an action by him for the injury, if it appear that he was not able to read, and that if no suspicion be thrown upon the plaintiff by the defendant; in such a case it may be taken that he had such cause, and he is entitled to recover, provided the dog be put in a place forming part of one entrance to the house of the defendant, although there may be other entrances of a more public description, by which the plaintiff might have proceeded; and the plaintiff, in the particular case, having been injured by the dog whilst proceeding to the defendant's house for a lawful purpose, recovered a verdict for 70*l.* damages. (x)

(t) See *ante*, 453.

(u) *Bates* v. *Crosbie*, M. T. 1798, K. B. MS.; 3 Bla. C. by Chitty, 154, note 7.

(x) *Sarch* v. *Blackburne*, 4 C. & P. 297; *per Tindal, C. J.*; and see *M'Kone* v. *Wood*, 5 Car. & P. 1.

Tindal, C. J. said, you cannot alter the law by the mode of framing the declaration; you must show that the dog was accustomed to bite, and that the defendant knew it, before you can throw upon him the responsibility of keeping it from doing so. If a man puts a dog in a garden, walled all round, and a wrongdoer goes into that garden, and is bitten, he cannot complain to a court of justice of that which was brought upon him by his own act. The difficulty is in saying whether, in the particular place, the means adopted by the defendant were sufficient. We must see first whether the plaintiff had a justifiable and reasonable cause for being on the spot, whether he was there without any notice, having such cause as would justify him, if he had an action brought against him as a trespasser for being on the defendant's premises. It seems that there are three different entrances to the premises, one of them more public than the rest, having a spring gate, another, called the middle entrance, across a field, the third an entrance across the cow-yard, and through a private gate, and another yard to the house. The plaintiff must have gone through one of the last two. Undoubtedly a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of ac-

So though it has been considered that an occupier has a right to place a *mischievous bull* in his own close when properly fenced, if no other person have a right of entry to use a way or otherwise be therein, and that if a trespasser be hurt, he will not be entitled to any compensation; (*y*) yet if there had been a right of common or of way, or even if a way there had been previously permitted, though not legally claimable, and the use of it had not been duly countermanded, it would be otherwise. (*z*)

In general, if there be a dangerous animal or *other danger* in a close, through which there is a footpath, the occupier should at least give notice of such danger, or he will be liable to an action, even admitting he had a right to place such danger there. (*a*) Indeed in case of a dangerous animal or instrument likely to do mischief to another in a private close, it should seem that public notice thereof should be given, although no one has any right to enter. (*b*) And it should seem to be illegal to sink a deep and dangerous pit in a close through which a person has habitually trespassed, in order that he might fall therein and be injured; and that unless he had had express notice of such particular danger he might prosecute, if not sue for the injury. (*c*)

It has however been held, that the owner of a waste, although uninclosed and near a highway, may dig a pit for the better enjoyment of his land, and if cattle of others stray from the

cess to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near the door of his house that any person coming to ask for money, or on other business, might be bitten. And so with respect to a footpath, though it be a private one, a man has no right to put a dog, with such a length of chain, and so near that path, that he would bite a person going along it. As to the notice, it does not appear to me that a *painted* notice is sufficient, unless the party is in such a situation in life as to be able to avail himself of it. It does not appear to me that this notice is sufficient so as to bar the action, if the plaintiff had any right at all to be on the spot, for it seems that he was not able to read. Then was there any thing in the appearance of the dog which would lead the plaintiff to suppose that the dog would bite him? It seems that this injury happened in the middle of the day, in the month of July, and that the plaintiff was a person employed as a watchman in the neighbourhood, and as no suspicion has been thrown upon him by the other side, you may presume that he was going to the house for a lawful purpose. The only way in which I can leave the question (which I admit is one of considerable nicety) for your consideration is to leave it to you to say on which side was the negligence upon this occasion. If there was negligence on the part of the plaintiff, he cannot recover for an injury which he has in part brought upon himself; but if there was no negligence on his part, and there was negligence on the part of the defendant, then the plaintiff will be entitled to your verdict.—Verdict for plaintiff—damages, 70*l.*

(*y*) *Brooke* v. *Copeland*, 1 Esp. R. 203; *Deane* v. *Clayton*, 1 J. B. Moore, 225, 245; *Bird* v. *Holbrook*, 4 Bing. 642.

(*z*) Id. ibid.; *Deane* v. *Clayton*, 1 Moore, 234, 235, 244.

(*a*) *Per* Holroyd, J. in *Ilott* v. *Wilks*, 3 B. & Ald. 316, and *Bird* v. *Holbrook*, 4 Bing. 642, and *Deane* v. *Clayton*, 1 Moore, 234, 235, 244.

(*b*) *Semble*, *per* Bayley, J. in *Ilott* v. *Wilks*, 3 Bar. & Ald. 312, 313.

(*c*) *Quære.*

way and fall in and perish, he will not be liable to any action, because the digging of the pit was lawful, and there was no obligation to fence against trespassers. (*d*)

So the owner of a several fishery with the soil, may place hooks in the bed of the stream to destroy the nets of persons endeavouring unlawfully to fish therein; (*e*) or the occupier of a field may fix bushes there, as a guard against those who shall attempt, without his leave, to draw nets over it for game, (*e*) although at common law he could not, whilst a trespasser was fishing or poaching, directly cut the nets, nor can now do so, unless under authority of particular acts of parliament. (*f*)

As the common law recognizes that *poultry* are a valuable property, it is actionable at common law to throw poisoned corn on a party's own land, and thereby poisoning a neighbour's fowls. (*g*) But it has been suggested that a man might corrupt water in his own land, and that if cattle should escape into such land and be injured in consequence of drinking the water, the owner could not sue the former. (*h*) And before the present game act, a person might with impunity throw poisoned corn on his own land, and thereby kill the game of his neighbour, the law not considering game any valuable property when off the land of a person to which they usually resorted. But it is now expressly declared illegal maliciously to put any lime or other noxious material in any water, with intent thereby to destroy any of the fish therein; (*i*) and the placing poison or poisoned ingredients on any land, with intent to destroy or injure the game, subjects the party to a conviction in 10*l.* penalty. (*k*) At common law, if a person keep glandered horses in his stable, so near to that of another as to cause infection, he is liable to an action; (*l*) and before the statute of Anne, a person who negligently let his own house take fire, and it extended and burnt that of others, he was liable to make compensation. (*m*)

A person may justify killing a dog in a *warren* whilst pursuing the rabbits there, or whilst pursuing deer in a park,

(*d*) *Blyth* v. *Topham*, Cro. Jac. 158; 1 Rol. Ab. 88, pl. 4; *Deane* v. *Clayton*, 1 J. B. Moore, 216, 224, 225, 234, 235.

(*e*) *Per* Gibbs, C. J. in *Deane* v. *Clayton*, 1 J. B. Moore, 242.

(*f*) See cases 607, note (*p*).

(*g*) *Sears* v. *Lyons*, 2 Stark. R. 317.

(*h*) *Per* Gibbs, C. J. in *Deane* v. *Clayton*, 1 J. B. Moore, 244. *Sed quære*, see *Sears* v. *Lyons*, 2 Stark. R. 317; see 7 & 8 Geo. 4, c. 30, s. 15; 1 & 2 W. 4, c. 32, s. 3; and see Burn's J. Surety for good Behaviour, where Dalton, J. required surety on a similar account.

(*i*) 7 & 8 Geo. 4, c. 30, s. 15; *ante*, 193.

(*k*) 1 & 2 Wm. 4, c. 32, s. 3; *ante*, 404; and see *Sears* v. *Lyons*, 2 Stark. R. 317.

(*l*) Bul. N. P. tit. Action, Case.

(*m*) 6 Ann. c. 31; Chit. Col. Stat. 365, and notes.

if he cannot otherwise prevent the destruction of the rabbit or deer, but if he could, then he must not kill the dog. (n)

But neither the occupier of other lands, nor the lord of a manor, or his gamekeeper, has any right directly to shoot or seize a dog illegally pursuing a hare when *self-hunting;* (o) though before the late Game Act, if the dog were at the time illegally used by an unqualified person, as the same might have been seized for the use of the lord, so he might be killed, as in fact after the seizure he became the property of the lord. (p) The seizure of *a dog*, or taking *any engine* for destroying *game*, appears now only to be legal when they are used to destroy *deer*, (q) or in illegal night poaching. (r) The Court of Common Pleas were equally divided, and no judgment was given on the question, whether an occupier of land can legally place *dog spears* on his land, to protect game and kill dogs in pursuit thereof, even after public notice of having done so; (s) and in a subsequent case it appeared to be considered that such instrument to *kill* (and not merely catch or impede) a dog could not be set, even with notice, at least when woods communicate with each other without any fence, (t) still less is it legal to tempt dogs by trailing meat from an high road towards an engine where they are injured. (u)

(n) 1 Saund. 84; *Keck* v. *Halstead*, 2 Lutw. 1494; *Wadhurst* v. *Dumme*, Cro. Jac. 44; 2 Rich. C. P. 435; *Vere* v. *Lord Cawdor*, 11 East, 568.

(o) *Vere* v. *Lord Cawdor*, 11 East, 568; *Deane* v. *Clayton*, 1 J. B. Moore, 218; *Carpenter* v. *Adams*, Comb. 183; *Athill* v. *Corbett*, Cro. Jac. 463; as to shooting a dog which has worried sheep; *Wells* v. *Head*, 4 Car. & P. 568. *Redish and another* v. *Watson and another*, Lancaster assizes, March 27, 1833. Trespass, for shooting a greyhound bitch by the defendants. Pollock for plaintiff, and Williams for defendant.

The defendants were two gamekeepers of a Mr. Horton, of Bald-hall. The greyhound had been sent by the plaintiffs to be kept by Tickell, who farmed land about half a mile from Bald-hall. On 18th of January, 1833, the greyhound, together with a little dog belonging to Tickell, got away from home, and were seen in a clover field at some distance. The two keepers crept along the hedge as if to near the dog. One of them, when at a distance of 11 yards, put his gun to his shoulder and fired; the dog yelled and fell; the other then discharged his gun at the animal then lying on the ground. Two witnesses spoke as to the value of the animal; one of them said he had heard 20*l.* offered to the plaintiffs for the dog, and he thought it worth from 40*l.* to 50*l.*; the other witness stated the worth to be from 20*l.* to 30*l.*

The learned judge, in summing up, told the jury that the only question for them to consider was that of the value, for it was quite clear that if the defendants had destroyed the dog, as had been stated, they must be amenable for the damage they had done. The dog might or might not have been hunting for game, and if he had done mischief his owner was liable for it, but that would be no justification of the defendants in killing it as they had done.

The jury, after a short deliberation, returned a verdict for the plaintiff.—Damages, 20 guineas.

(p) *Kingsworth* v. *Bretton*, 5 Taunt. 416; 1 Marsh. 106, S. C.

(q) 7 & 8 Geo. 4, c. 29, s. 29.

(r) 9 Geo. 4, c.

(s) *Deane* v. *Clayton*, 2 Marsh. R. 577; 1 J. B. Moore, 202; 7 Taunt. 489; Burrough, J. and A. Park, J. against the right; Dallas, J., and Gibbs, C. J. in favour of it.

(t) Per Best, J. and Park, J., in *Bird* v. *Holbrook*, 4 Bing. 642, 643; and see *Sears* v. *Lyons*, 2 Stark. 317.

(u) *Townsend* v. *Walhem*, 9 East, 277; *Deane* v. *Clayton*, 1 J. B. Moore, 235, 245.

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Though it is a maxim that a man cannot legally do indirectly that which he could not do directly, *quando aliquid prohibetur ex directo prohibetur et per obliquam*, (x) and it is admitted that a person could not legally directly run spikes or glass bottles into a man, to deter him from entering his close, (y) or shooting a dog for the same purpose; (y) yet it is admitted that he may, to prevent persons from getting over his wall into a garden, place such spikes or glass bottles at the top, and if the party be injured he has no remedy. (z) And it should seem, that admitting that a party might at common law be *criminally* responsible for adopting too daangerous a mode of protecting his property, not being himself present, and thereby occasion injury to the person of another, yet that if the party injured were a trespasser, and had *notice* of the measure adopted, he cannot sustain a *civil action* for the injury; (a) and accordingly it was holden before the late act, prohibiting the setting of spring guns, (except *in a house at night*,) that a trespasser, having knowledge that there were spring guns in a wood, although ignorant of the particular spots where they are placed, could not maintain an action for an injury received, in consequence of his accidentally treading on the latent wire, communicating with the gun, and thereby letting it off. (b) But now, as the setting of a spring gun, man-trap, or other engine, calculated to destroy human life *or inflict grievous bodily harm*, and with that intent, is an indictable misdemeanor (with an exception as to such guns or traps as may have been usually set with the intent of destroying *vermin*, and as to spring guns, man traps, and other engines set in a dwelling-house for the protection thereof from sunset to sunrise); (c) consequently, since that act,

(x) Wingate, 680; *Deane* v. *Clayton*, 1 J. B. Moore, 219.

(y) *Vere* v. *Lord Cawdor*, 11 East, 568; *Deane* v. *Clayton*, 1 J. B. Moore, 222, 223; *per* Dallas, J., *per* Gibbs, C. J. Id. 247; and *per* Holroyd, J. in *Ilott* v. *Wilkes*, 3 Bar. & Ald. 314.

(z) Id. ibid; 1 J. B. Moore, 247, 248.

(a) *Per* Gibbs, C. J. in *Deane* v. *Clayton*, 1 J. B. Moore, 249.

(b) *Ilott* v. *Wilkes*, 3 Bar. & Ald. 304.

(c) 7 & 8 Geo. 4, c. 18, "Whereas it is expedient to prohibit the setting of spring guns and man traps, and other engines calculated to destroy human life, or inflict grievous bodily harm;" be it therefore enacted and declared by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, if any person shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith; the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor.

II. Provided always, and be it further enacted, that nothing herein contained shall extend to make it illegal to set any gin or trap such as may have been or

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it has been decided, that it being illegal to set a spring gun elsewhere than in a house at night, a person whose property in a walled garden had been stolen, and who set the gun there in the day time to protect his property, *without giving notice*, was liable to an action for an injury to a person who got over the wall to catch an escaped peacock, though a trespasser without license; (*d*) and perhaps he would now be liable, even if he had giving notice, on the ground that it is inhuman to catch a *man* by means which may maim him or endanger his life; (*e*) and that as it is a misdemeanor to set them, it is not to be believed that in fact the guns had been set as pretended; besides, the party injured might not be able to read or might not have read the notice. (*f*)

When a spring gun or other dangerous instrument has been set in a house, under the exception in this statute, the notice thereof should be qualified accordingly; and when any traps have been set in woods and grounds to kill *vermin*, instead of a notice in the form used in Deane *v.* Clayton, (*g*) if a dog-spear, trap or instrument, likely to injure a dog, be placed there, (the right to do which, it will be recollected, is questionable,) the notice should be framed as suggested in the note. (*h*) And the instrument set should be at least adapted to the de-

may be usually set with the intent of destroying vermin.

III. And be it further enacted and declared, that if any person shall knowingly and wilfully permit any such spring gun, man trap, or other engine as aforesaid, which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid.

IV. Provided always, and be it further enacted, that nothing in this act shall be deemed or construed to make it a misdemeanor, within the meaning of this act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set, or caused or continued to be set, in a dwelling-house for the protection thereof.

V. Provided always, and it is hereby further enacted and declared, that nothing in this act contained shall in any manner affect or authorize any proceedings in any civil or criminal court, touching any matter or thing done or committed previous to the passing of this act.

VI. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to that part of the United Kingdom called *Scotland*.

(*d*) *Bird* v. *Holbrook*, 4 Bing. 628; *Jay* v. *Whitfield*, cited 3 Bar. & Ald. 308.

(*e*) *Bird* v. *Holbrook*, 4 Bing. 643. Formerly it was, it seems, the practice upon such occasions to give public notice in the adjacent market towns, *per* Burrough, J. in *Bird* v. *Holbrook*, 4 Bing. 644, 645; and *semble* that practice might still be expedient, because printed boards may not be seen or read.

(*f*) See *Sarch* v. *Blackburne*, 4 Car. & P. 297, as to notice in fact of a ferocious dog, *ante*, 604, 605, note (*x*).

(*g*) *Deane* v. *Clayton*, 1 J. B. Moore, 206.

(*h*) "Take notice that gins and traps *and other instruments* are set in these woods and grounds to destroy *foxes* and *vermin*, *and which if dogs should be suffered to enter may be injurious to them.*"

Suggested form of notice of traps, &c. having been set on grounds.



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struction of foxes and vermin, and not peculiarly calculated to injure dogs. A small spring trap, in the nature of a rat-trap, might be placed so as to spring upon the lower part of the leg of a fox, and maim or catch him, and have the same effect upon dogs, without the possibility of injury to man, because too small to receive his foot and ancle.(*i*)

It was held that any proprietor of land, exposed to the inroads of the *sea*, may endeavour to *protect* himself by erecting a *groyne*, or other reasonable defence, although he may thereby render it necessary for the owner of the adjoining land to do the like.(*k*) But it has been held in the House of Lords, (varying the judgment of the Court of Sessions,) that an heritor was not entitled to erect a bulwark or any other work on the banks of the *river Tay*, which might have the effect of diverting the stream of the river in times of flood from its *accustomed* course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's land from the flood; (*l*) and it was considered in the same case, that the Roman law and the law of England is in this respect the same.(*m*) But a party may erect such a bulwark or a bank to prevent an apprehended *alteration* of the *old* channel.(*n*) And where a public canal navigation had been established by act of parliament, it was held that occupiers of land adjoining could not legally, though for the protection of their own lands, heighten their artificial banks so as to prevent the flood water overflowing their lands, and if the so doing would injure the banks of the canal, and that if they did, they were liable to an indictment. (*o*) So a person may even justify the necessarily pulling down a neighbour's house to prevent the progress of a fire which would otherwise consume both. And a person may legally, with a proper dog, drive sheep off his own ground into that of another, from whence they escaped, if he cannot otherwise get them off his own. *Per* Crew, C. J., " It seems to me that he might drive the sheep out of his own ground with the dog, and he could

(*i*) See exception in sect. 2 of 7 & 8 Geo. 4, c. 18, *ante*, 608, 609, note (*c*).

(*k*) *Rex* v. *Pagham*, 8 B. & Cres. 355; approved of in *Rex* v. *Trafford*, 1 B. & Adolp. 888, where the difference between protecting against inroads of the sea and rivers is taken.

(*l*) *Menzies* v. *Earl Breadalbane*, 3 Wils. & Shaw, 235; and see *The King* v. *Lord Yarborough*, 1 Dow. Rep. N. S. 178; and see *Wright* v. *Howard*, 1 Sim. & S. 190; and *Williams* v. *Morland*, 2 Bar. & Cres. 910, *ante*, as to what may be done with a watercourse in general, &c.

(*m*) *Menzies* v. *Earl Breadalbane*, 3 Wils. & Shaw, 243.

(*n*) Id. 245; *Farquharson* v. *Farquharson*, A.D. 1741, cited Id. 244; and see Lord Tenterden's observations in *Rex* v. *Trafford*, 1 Bar. & Adolp. 888.

(*o*) *Rex* v. *Trafford and others*, 1 Bar. & Adolp. 874.

not withdraw his dog when he would in an instant; (q) but the chasing of another person's sheep should be by a *small* dog or one that would not wound or injure them. (r)

So if my house require repairing or rebuilding, so as to render it necessary to pull down a wall on my land near the house of another, I may pull it down after giving him notice of my intention, so as to allow him time to shore up his own house; after which, if I do no more than is essential for rebuilding my own house, I am not liable to compensate any damage to the neighbour by the falling of his house for want of support; for he ought to have built his house on his own land so independently as to prevent any ill consequence from what I may legally execute on mine, or to have shored up in due time. (s) But with respect to houses within the bills of mortality, the building act contains some regulations to be previously observed in this respect. (t)

A person may legally shoot *Rooks* on his own land, and even so near to a rookery as to disturb the birds in building their nests and breeding there; for however unneighbourly such an act may seem, the law acknowledges no valuable property in rooks, nor affords any civil or criminal remedy in respect of them. (u) But with regard to *Pigeons*, if any person unlawfully and wilfully kill, wound, or take any house-dove or pigeon under such circumstances as shall not amount to larceny at common law, such offender, being convicted thereof before a justice of the peace, shall forfeit, over and above the value of the bird, any sum not exceeding two pounds; (x) and therefore although no action may be sustainable against a person for shooting my pigeon on his ground, yet he would incur this penalty. (y) And for shooting upon a person's own land near to a *Decoy*, so as to frighten away wild fowl, an action on the case is clearly sustainable; (z) and if he fire so that the shot fall on my land, then trespass lies. (a) *Rabbits*, when in a warren, or ground

(q) *Miller* v. *Fandrye*, Poph. 161; *Sutton* v. *Moody*, 1 Lord Raym. 250, 14; *Churchyard* v. *Studdy*, 14 East, 249; *Anthoney* v. *Haney*, 8 Bing. 189.

(r) *Blockley* v. *Slater*, Latch. 119, 120, he should use "*un petite chien.*"

(s) *Peyton* v. *Mayor of London*, 9 Bar. & Cres. 725; and *Brown* v. *Windsor*, 1 Cromp. & J. 20; and see *Wyatt* v. *Harrison*, 3 Bar. & Adolp. 871.

(t) 14 Geo. 3, c. 78.

(u) *Hannam* v. *Mockett*, 2 Bar. & C. 934; 4 Dowl. & R. 518, S. C.; *ante*, 189.

(x) 7 & 8 Geo. 4, c. 29, s. 33.

(y) *Dewell* v. *Sanders*, Cro. Jac. 492; 2 Burn's J. Game, Pigeons, 939.

(z) *Keble* v. *Hickringill*, 11 Mod. 74, 130; 11 East, 374, S. C.; *Carrington* v. *Taylor*, 11 East, 571; 2 Campb. 258, S. C.; *ante*, 118, 188.

(a) *Pickering* v. *Rudd*, 4 Campb. 220; 1 Stark. 58, S. C.; *Keble* v. *Hickringill*, 11 Mod. 74, 130; *Gregory* v. *Piper*, 9 Bar. & C. 591; *Lawrence* v. *Obee*, 1 Stark. R. 22.

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lawfully used for the breeding or keeping rabbits, are protected by the 7 & 8 Geo. 4, c. 29, s. 30, which enacts that if any person shall unlawfully and wilfully, in the night time, take or kill any hare or cony in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be punished accordingly; and if any person shall unlawfully and wilfully, in the day time, take or kill any hare or cony in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet: Provided always, that nothing herein contained shall affect any person taking or killing in the day time any conies on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

If rabbits are out of the warren, and escape into the ground of another, he has the property therein whilst there *rationi soli*, and may lawfully kill them, but he could not sue the owner of the warren for the damage done by them. (*b*) So it was formerly held that a commoner might kill rabbits depasturing a common and injuring the pasture there, though he could not sue the lord. (*c*) But it was afterwards decided, that if the lord surcharge the waste with rabbits, the commoner may sue him for the consequential injury to his common right, and cannot legally kill the rabbits, or destroy the burrows; and this latter decision seems to be law. (*d*)

With respect to *Foxes* and *Fox-hunters*, (*e*) and *Stag* hunting, (*f*) although the pursuit is generally tolerated and permitted, yet it is in law illegal, and the hunters may be warned off like any other trespassers; (*g*) and a master or huntsman stimulating the hunt is liable for the aggregate damages committed, though he do not himself trespass on the grounds. (*h*)

(*b*) *Boulston's Case*, 5 Coke, 104.

(*c*) *Boulston* v. *Hardy*, Cro. Eliz. 548; *Hadesden* v. *Grysset*, Cro. Jac. 195; *Hinsley* v. *Wilkinson*, Cro. Car. 388.

(*d*) *Cooper* v. *Marshall*, 1 Burr. 259.

(*e*) See the *Earl of Essex* v. *Capel*, Christian's Game Law, 114; and Chitty's Game Law, 31, S. C.

(*f*) *Baker* v. *Berkley*, 3 Car. & P. 32.

(*g*) See note (*e*).

(*h*) *Hume* v. *Oldacre*, 1 Stark. R. 351; *Baker* v. *Berkley*, 3 Car. & P. 32.

III. When a relation, servant, friend or stranger may interfere in defence of person or personal or real property, and how.

III. The principles and rules which allow self-defence of a party's *own person* are extended to certain *relations*. Thus husband and wife, parent and child, master and apprentice, and master and servant, are legally excused, and sometimes even justified in *killing* an assailant about to commit a *forcible felony* upon the other, when such homicide has been committed in the necessary or lawful defence of each other respectively; the act of each of those relations *being then construed the same and equally permitted as the defence of the party himself.* (*i*) When indeed a *felonious attack* is made *upon an individual* or his *habitation*, then *any other* person, though not a relation, may lawfully interfere to prevent the mischief intended, and if in so doing death ensue, he will in that case be justified. Thus in the instance of arson or burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do; and it seems there is no difference between the acts of the principal and of any third persons in resisting such *forcible felonies.* (*k*)

But with regard to *mere trespasses*, there is a very material difference between the interference of certain *relations* and of mere *strangers*. The former may justify immediate resistance *with force* when necessary, but a stranger can only interfere *moderately* and *moliter manus* to *prevent* the wrong. Thus a husband, a parent, or a master, and the wife, the child, and the apprentice and servant, may justify the defence of the person of each other, and of the personal or real property of the superior, and this even *with force* in the first instance, the same as the party assailed himself might do. (*l*) It is the natural disposition and the duty of such near relations to protect each other, and it is the right of the master to defend his servant, because he has an interest in him not to be deprived of his service, and the servant may defend his master because it is part of his duty in respect of his employment and wages to stand by and defend his master. (*m*) It has been observed that the law permits those who stand in the relations of husband and wife, parent and child, master and apprentice or servant, when the superior is forcibly attacked in his person or property, or the inferior in his person, to repel force by force; (*n*) because the law respects and indulges the passions and natural affections of the human mind, and when external violence is offered to a man himself or to one to whom he bears so near a

(*i*) 1 Hale, P. C. 448; 4 Blu. C. 186.
(*k*) 1 East, P. C. 289, 290.
(*l*) Rol. Ab. 546; *Seaman* v. *Cuppledick*, Owen, 151; 3 Bla. C. 3.
(*m*) 1 Bla. C. 429.
(*n*) 2 Rol. Ab. 546.

connection, makes it lawful to do that immediate justice to which he is prompted by nature, and which no prudential motives would be strong enough to restrain. But in each of these cases, as in mere self-defence, care must be taken that the resistance does not exceed the bounds of mere *defence and prevention*, (o) for otherwise the defender would himself become an aggressor. (p) However, in the near relation of parent and child much indulgence is allowed for the feelings of each relative, and when a man's son was beaten by another boy, and the father went near a mile to find him and then revenged his son's quarrel by beating the other boy, of which he afterwards died, it was held to be only manslaughter and not murder, such indulgence does the law show to the frailty of human nature and the workings of parental affection. (q)

It has been said that a *master* cannot justify an assault in defence of his *servant*, because he might have an action *per quod servitium amisit.* (r) But such interference is clearly lawful; (s) and Lord Hale said, that "the law had been for a master killing in the necessary defence of his servant, the husband in defence of his wife, the child of the parent or the parent of the child, for the act of the assistant shall have *the same construction* in such cases as the act of the party assisted should have had if it had been done by himself, for they are in a mutual relation one to the other." (t) And it has been considered that a master shall not forfeit a recognizance of the peace for beating another in defence of his servant, nor the servant for beating another in defence of his master. (u)

Interference of friends.

With respect to the interference of *friends*, it has been observed that upon the whole, although Lord Hale and others appear sometimes to have intimated a distinction between the cases of *servants and friends* and that of a mere *stranger*; yet that the distinct limits between each are no where accurately defined. It should seem that there is no *legal* distinction between friends and strangers, (x) and that the nearer or more remote connection of the parties with each other, as regards friendship,

(o) As to which, see *ante*, 595, 596.

(p) 3 Bla. C. 3, 4; 1 Bla. C. 450.

(q) *Rowley's case*, Cro. Jac. 296; 1 Hawk. P. C. 83; 1 Bla. C. 450. The homicide amounted to manslaughter and was not justifiable, because even if the son himself had killed the aggressor after he thus ceased to beat him, it would not have been justifiable.

(r) *Leewerd* v. *Basilee*, 1 Salk. 407; 1 Ld. Raym. 62; S. C. Bull. N. P. 18.

(s) 2 Rol. Ab. 546, D. pl. 2; *Seaman* v. *Cuppledick*, Owen, 151; Bac. Ab. Master and Servant, P.; *Tickel* v. *Read*, Loft, 215.

(t) 1 Hale, P. C. 484.

(u) Hawk. B. 1, c. 60, s. 24.

(x) But see *Rex* v. *Tooley*, 2 Ld. Raym. 1296; 1 East, P. C. 325; where the five judges appear to have classed friends with relations as to the effect of provocation.

is more a matter of observation to the *jury* as to the probable force of the provocation and the motive which induced the interference of a third person, than as furnishing any precise rule of law grounded on any such distinction.(*y*) With a jury the circumstance of the third person interfering being an old and intimate friend of the person attacked will generally have weight, but in point of law it should seem that the interference of *friends* is to be decided upon by the same rules as *strangers* in their motives for and mode of interfering; and that in strictness friends can, in point of law, only interfere to preserve the peace, and not to take the part of either; and certainly any plea of justification by a *friend* must be framed precisely as if he were a mere stranger; and a friend cannot (as a relation or servant may) justify defence *with force* but only *moliter manus*, the same as any other stranger. (*z*).

Interference of strangers.

A mere *stranger* (though he may justify even a forcible entry and breaking open the outer door of a house upon a cry of *murder* from within, to prevent the commission of that offence (*a*) or any other *felony*,) cannot justify an interference *with force* in the first instance to prevent battery of a third person or any other trespass or civil injury, where death or any *felony* is not likely immediately to occur, but must proceed more moderately, and should previously *declare* or signify that he interferes merely to preserve the peace and not as a partisan, and he can only justify the gently laying on of his hands to prevent a breach of the peace; (*b*) though afterwards, if he be himself attacked by either party, he may then defend himself with the same degree of force as if he had been originally illegally assailed.(*b*)

In cases of illegal restraint of liberty. (*c*)

With respect to the interference of *strangers*, where the *process turns out to be illegal*, it seems to have been considered by seven judges against five, that the illegal restraint of *any one's liberty* is a sufficient provocation to bystanders, or as Lord Holt expressed himself, *a provocation to all the subjects of England*. The five judges who held the particular homicide to have been murder, thought that it would have been a sufficient provocation to a *relation* or *friend*, but not to a *stranger*.(*d*) Mr. Justice Foster, however, afterwards objected to the opinion of the seven judges, and insisted that the provocation which

(*y*) 1 East, P. C. 292.
(*z*) *Barfoot* v. *Reynolds*, 2 Stra. 954.
(*a*) *Handcock* v. *Baker*, 2 Bos. & P. 260.
(*b*) *Barfoot* v. *Reynolds*, 2 Stra. 954; 2 Hale, 484; 1 East, P. C. 290, 306. See form of plea by a stranger, 3 Chit. Pl. 1070.
(*c*) See further *post*, section v. as to resistance of process, rescue, &c.
(*d*) *Rex* v. *Tooley*, 2 Lord Raym. 1296; 1 East, P. C. 325, 326; and see *Rex* v. *Osmer*, 5 East, 308; *Pedley's case*, 1 Leach, 245.

extenuates homicide into manslaughter, must be *a sudden provocation immediately* felt by the party *himself* at the time of the fact, and not a resentment suggested by reflection or political reasoning, for an injury done to a *stranger*, and the consequence of that injury to the public in general; and that on such occasions as these, a *general submission to the known badges of authority, exacted from all strangers* to the party supposed to be injured in his cause, would greatly conduce to the stability of government, on the fate of which all private rights are invested; and certainly the five judges thought it of dangerous consequence to give any encouragement to private men, when strangers to the injury, to take upon themselves to be the asserters of *other* men's liberties, and to become *partizans* to rescue them by force from wrong, especially in a nation where there are good laws for the punishment of all such injuries; and one great end of law is, to right men by peaceable means, (as by habeas corpus,) and to discountenance all endeavours even of parties to right *themselves* by force, much less *other* men who were strangers. (*e*) And when a man is apprehended and in the custody of officers of justice, and a third person espouses his cause and encourages the prisoner to resist, the officers may imprison such third person; and Lord Kenyon is reported to have said, that *when a man is in the actual custody of the officers of justice, no other person has a right to interfere.* If he were taken *illegally*, the officers must answer it at their peril, (*f*) and an habeas corpus may be obtained, and this is certainly the safer rule, unless in most violent and gross violations of liberty.

However, subsequent and modern decisions support the decision of the seven judges, and establish that even a stranger's interference, and even his killing the officer, when the imprisonment was illegal, would only constitute manslaughter, and not murder. (*g*) And in a modern case, where a person arrested another, and it did not appear that he was strictly authorized by the process to do so, it was held that an indictment against a *stranger* for rescuing him could not be supported; (*h*) and in an indictment against a person for rescuing a person from the house of correction, it was held that it must appear that the latter was *legally* imprisoned there. (*i*)

(*e*) Fost. C. L. 312, 317; 1 East's P. C. 326 to 329.

(*f*) *White* v. *Edmonds & others*, Peake's Rep. 89, 90.

(*g*) See *Mary Adey's case*, 1 Leach, C. L. 189, 206, 245, 253; 1 East's P. C. 329, note (*b*).

(*h*) *Rex* v. *Osmer*, 5 East, 304, 308; 1 Smith's R. 555, S. C.; and see *Rex* v. *Freeman*, 2 Strange, 1226.

(*i*) *Rex* v. *Freeman*, 2 Stra. 1226.

In case of a libellous caricature, causing a person to become an object of ridicule, it has been considered justifiable in the party libelled even to destroy the picture, and even excusable in a *near relation* to do so, (*k*) but the safer course is to take the libel to a magistrate. (*l*)

Defence and prevention of injury to relative rights.

We have seen that a parent or guardian, or a master, may *prevent* any injury in that character, and may interfere and even by force defend his child, his ward, or his apprentice or servant, (*m*) although a stranger could only interfere to preserve the peace. (*n*) So a parent or guardian of a female under age, who had eloped without his knowledge, is justified in detaining her clothes; and a carrier, to whom they had been delivered for the purpose of conveyance, is justified in delivering them over to the parent or guardian, and by so doing he cannot be considered as having been guilty of an illegal conversion. (*o*)

IV. Of apprehending and detaining wrong-doers and their implements, &c. (*p*)

IV. One of the most immediate and effectual means of preventing an injury, or securing punishment for its completion, is the *apprehension and detainer* of the wrong-doer "*found committing*" or *whilst committing* the offence; or in the case of *felony* when he is escaping; and also of seizing his engines about to be used and then using for the wrongful purpose. It will be obvious that in many instances, if it were necessary to wait until a magistrate's warrant could be obtained, or even for the interference of a peace officer, many unknown and transient offenders would escape, and therefore the common law and numerous modern statutes authorize parties themselves, who have been or are likely to be injured, and others on their behalf or for the security of the public, to interfere of their own accord, and apprehend the offender *whilst found committing* an offence, or *flagrante delicto*, or *very shortly after* the offence has been committed, and then to deliver the offender to a peace officer, or to convey him before a justice of the peace; but these powers were not intended to encourage the apprehension without a regular justice's warrant of known ***substantial inhabitants*** in the neighbourhood, in every case of petty offence. (*q*)

(*k*) *Du Bost* v. *Beresford*, 2 Campb. 511; *Earl Lonsdale* v. *Nelson*, 2 Bar. & Cres. 311; *Anon.* 5 Coke's R. 125, 126; and *post*, Abatement of Nuisances.

(*l*) *Anon.* 5 Coke's R. 125, b.

(*m*) 2 Rol. Ab. 546; *Seaman* v. *Cuppledick*, Owen, 151; Bac. Ab. Master and Servant, P.

(*n*) *Barfoot* v. *Reynolds*, 2 Strange, 953.

(*o*) *Baker* v. *Taylor*, 1 Car. & Payne, 101.

(*p*) See in general 1 Chit. Cr. L. 11 to 71; Burn's J. tit. Arrest—Constable—Police—Vagrant—Warrant, 7 & 8 Geo. 4, c. 29, 30.—N. B. The 9 Geo. 4, c. 31, contains no provision for apprehending offenders.

(*q*) Per Tindal, C. J. in *Hanway* v. *Boultbee*, 2 Mood. & M. 15; 4 Car. & P. 350, S. C.; see *post*, 625.

CHAP. VII. REMEDIES BY PARTIES, &c.

When a private person or constable may apprehend wrong-doer *at common law* without warrant.

In cases of mere civil injuries without force, or even of a *breach of the peace*, as an assault or battery, no private individual can in general at *common law* arrest, apprehend or imprison the wrong-doer, but can at most *remove* him from his dwelling-house without any imprisonment; (*r*) and in the case of an importunate beggar, who refuses to quit a party's premises, the latter can only legally turn him out, and cannot imprison him unless he comes within the provisions of the vagrant act.(*s*) Nor can a private person at *common law* apprehend or imprison another for a *misdemeanor* or *breach of the peace* after it is over without a warrant; nor can a constable do so at common law, *unless he had view of such misdemeanor or breach.* (*t*) And though a person may push or force a person out of his house, or from a church, when making a disturbance there, yet we have seen that, after he has removed the party, he cannot, without warrant, apprehend or imprison him even for the purpose of conveying him before a magistrate. (*u*)

But *private* individuals are not only permitted but *enjoined* by law to arrest an offender when present at the time a *felony* is committed or dangerous wound given, on pain of fine and imprisonment if the wrong-doer escape through their negligence.(*x*) And the same duty exists where a person is detected in the attempt to commit a felony; (*y*) and although the offender ran away and give over his intention of committing the felony, still it seems on fresh pursuit he may be apprehended by any one. (*z*) And when it is certain that a *felony* has in fact been committed *by some one*, any private individual, though not particularly interested, is excused in imprisoning a person who turns out to have been wholly innocent, if he can prove that he had *reasonable* or *probable cause* for suspecting that he was the felon, and in such a case he may himself apprehend, or direct a peace officer to apprehend, the party whom he so supposes to have been guilty. (*a*) But if it should turn out that *no felony* had been committed *by any one*, then (excepting in the case of

(*r*) *Williams* v. *Glenister*, 2 Bar. & Cres. 699; 4 D. & R. 217, S. C.; Burn's J. Arrest, II. (II.)

(*s*) *Price* v. *Severn*, 7 Bing. 316.

(*t*) Hawk. B. 2, c. 12, s. 20, 21; 1 East's P. C. 300; Bac. Ab. Trespass, 3 D.; *Rex* v. *Dyson*, 1 Stark. R. 246; *Fox* v. *Gaunt*, 3 Bar. & Adol. 798.

(*u*) *Williams* v. *Glenister*, 4 D. & R. 217; 2 Bar. & C. 699, S. C. *supra*. It was therefore also doubted whether a sexton could legally, without a warrant, apprehend a person in the act of stealing a dead body in a church yard, that not being a felony, R. & R. C. C. 365.

(*x*) 1 Hale, 587; 1 East, P. C. 298, 304; Hawk. b. 2, c. 12, s. 13; *Rex* v. *Hunt*, R. & M. C. C. 93; Selw. N. P. 3 ed. 830.

(*y*) *Rex* v. *Hunt*, Ry. & M. C. C. 93; *Rex* v. *Howarth*, Id. 207.

(*z*) *Rex* v. *Howarth*, R. & M. C. C. 207.

(*a*) *Ledwith* v. *Catchpole*, Cald. 291; *Samuel* v. *Payne*, Doug. 359; *Mure* v. *Kay*, 4 Taunt. 34; *Guppy* v. *Brittlebank*, 5 Price, 525; *Davis* v. *Russell*, 5 Bing. 364; 4 Inst. 144.

arrest upon hue and cry) (b) he would have no defence to an action for false imprisonment, although he had probable cause for suspecting the guilt. (c) Therefore, in a plea of justification, he must aver not only that a felony had been committed by some one, but also state the particular facts or causes inducing him *reasonably* to suspect the party imprisoned to have been guilty of that particular felony. (d) And although persons who *merely assist* a constable may give in evidence the grounds of their defence under the plea of general issue, a person who gives charge, and first induces such constable to act, must plead the circumstances specially. (e)

In cases of *Misdemeanors* it has recently been decided, that *suspicion* that a party has on a former occasion committed a misdemeanor, though accompanied with proof of the offence having been committed by *some one*, is no justification for giving the former in charge to a constable *without a justice's warrant;* and that there is no distinction in this respect between one kind of misdemeanor and another, as breach of peace and obtaining goods by false pretences. (f)

In cases of *mere breach of the peace*, before any charge has been made to a *peace officer*, and before he acts upon it without a justice's warrant, the latter must himself have had *actual view* of the breach of the peace, or the arrest without warrant would be illegal. (g) And where *A.* went to a house at night, demanding to see the servant, and he was told to depart, and he would not, and thereupon a constable was sent for, and *A.* went from the house to the garden, and when the constable arrived, *A.* told him that if a light appeared at the windows he would break them, upon which the constable took him into custody,

(b) Hawk. b. 2, c. 12, s. 16.

(c) *Samuel* v. *Payne*, Dougl. 359; *Beckwith* v. *Phillip*, 6 Bar. & Cres. 637; *Ledwith* v. *Catchpole*, Cald. 291; *Stonehouse* v. *Elliott*, 6 Term R. 315; *White* v. *Taylor*, 4 Esp. R. 81; *Flewster* v. *Royle*, 1 Campb. 187; *Hobbs* v. *Branscomb*, 3 Campb. 420; *Mure* v. *Kay*, 4 Taunt. 34; 1 Hale's P. C. 610.

In *Beckwith* v. *Phillip*, 6 Bar. & Cres. 625, Lord Tenterden stated, "that in order to justify a *private person* in imprisoning on suspicion of felony, he must not only make out a reasonable ground of suspicion, but must prove that a felony has actually been committed by some person though unknown; but a *constable* having reasonable *ground to suspect* that a felony has been committed, may, upon the charge of another, detain the suspected party, although it turn out that no felony had been committed." The case of *Adams* v. *Moore*, Selw. Ni. Pri. 4 ed. 865, is not law to the extent reported. But *semble*, that if a constable of his own *head* take a party into custody on suspicion of felony, and it turn out that no felony has been committed, he will be liable to be sued for the imprisonment, *Hobbs* v. *Branscomb*, 3 Campb. 420.

(d) Id. ibid.; *M'Cloughan* v. *Clayton*, Holt's C. N. P. 479; *Davis* v. *Russell*, 5 Bing. 364; 2 Moore & P. 590, S. C. The question of *probable cause* is a mixed question of law and fact, Id. ibid.

(e) *Hough* v. *Marchant and another*, 1 Mood. & M. 510.

(f) *Fox* v. *Gaunt*, 3 Bar. & Adolp. 798.

(g) *Sharrock* v. *Hannemer*, Cro. Eliz. 375; *Hardy* v. *Murphy*, 1 Esp. R. 294; *Coupey* v. *Henley*, 1 Esp. R. 540; *M'Cloughan* v. *Clayton*, Holt, C. N. P. 479; *Rogers* v. *Jones*, R. & M. C. C. 132; *Stobbs* v. *Branscomb*, 3 Campb. 420; 2 Hale, 90.

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it was held that as at most this amounted only to a *threat* to commit a breach of the peace, and did not constitute an actual breach in his view, the constable was not justified in so doing, and *A.* was acquitted upon an indictment for resisting the apprehension. (*g*)

It is safer, therefore, in all cases of the least doubt, for private individuals, especially when time will allow, rather than thus acting for themselves, to apply to *a magistrate for a warrant*, because, whenever an arrest takes place under such a warrant, the party imprisoned cannot sue in *trespass*, nor can he sustain even an action on the *case* for the malicious charge occasioning the imprisonment, although it should turn out that no offence whatever had been committed, unless he can prove that the party who obtained the warrant acted maliciously and without probable cause. (*h*)

It would be beyond the limits of this work to attempt to enumerate all the instances in which, by the *common law*, or by *general or local* statutes, private persons and officers are authorized, either with or without warrant, to apprehend supposed offenders. (*i*) The general rule is, that a private person, in order to justify or excuse his giving charge to a peace officer who has not had actual view of a breach of the peace, must be prepared to prove that a *felony* had been committed by some one, and that he had *reasonable grounds* upon facts to suspect that the party apprehended was the guilty person. (*k*) But a *constable*, or other proper officer, is justified in acting upon the charge of felony made by another, if he have reasonable grounds for suspecting that the party charged was guilty of the felony, though he turn out innocent, and although no felony whatever has actually been committed, (*l*) and if such officer have such reasonable suspicion, *he* may justifiably cause the party, though aged, and a resident in the place, even to leave his bed between ten and eleven at night, and go into prison till the next morning. (*m*) But he must not handcuff a person unless he has reason to fear an escape. (*n*)

Under the Metropolis Police Act, 10 G. 4, c. 44, s. 7.

There are many regulations of a local nature; as those relating to "*the metropolitan police district*," and extending over the metropolis and its vicinity and the river Thames, and also Middlesex, Surrey, Hertford, Essex, and Kent, viz. the

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(*g*) *Rex* v. *Bright*, 4 Car. & P. 387.

(*h*) *Leigh* v. *Webb*, 3 Esp. R. 166; *Belk* v. *Broadbent*, 3 T. R. 185; *Cooper* v. *Boot*, 1 T. R. 535, *post*, 630, note (*g*).

(*i*) See the general *common law* rules fully stated, 1 Chitty's Crim. L. 16 to 71, and Burn's J. tit. Arrest.

(*k*) *Davis* v. *Russell*, 5 Bing. 366; *Fox* v. *Gaunt*, 3 Bar. & Adolp. 798.

(*l*) Id. ibid. 354; 2 Moore & P. 590, S. C.; *Beckwith* v. *Phillip*, 6 B. & Cres. 637.

(*m*) *Davis* v. *Russell*, 5 Bing. 365.

(*n*) *Wright* v. *Court*, 4 B. & Cres. 596; 6 D. & R. 623, S. C.

3 Geo. 4, c. 55; (o) 6 Geo. 4, c. 21; and 10 Geo. 4, c. 44, (p) and c. 45, and which authorize any man belonging to *the police force*, during the time of his being on duty, to apprehend certain suspicious persons, as "all loose, idle, and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of evil design, and all persons whom he shall find, between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under that act." (q) The prior act, 3 Geo. 4, c. 55, s. 21, authorized, besides police officers, (r) "*other persons*" to apprehend every *such* suspected person, or *reputed thief*, and to convey him before a justice. But it was held that that provision only applied to the apprehension of persons of *general* bad character as rogues and vagabonds, and not to arrest on suspicion only of a particular felony. (s) Some powers of this nature were also given by the *metropolis paving act*.

Under General Vagrant Act, 5 Geo. 4, c. 83.

There are some acts extending over the *whole* kingdom, and which, on account of their *general* importance, we will more particularly consider. The *vagrant act*, 5 Geo. 4, c. 83, extends over the whole of England, and after defining, but in very general terms, who shall be deemed *idle and disorderly persons*, and who *rogues and vagabonds*, and who *incorrigible rogues* (and under which three heads almost every kind of suspicious person seems to be included,) (t) it authorizes "any

(o) Sec. 19, 21, 25, 29, 32.

(p) Sec. 17. See the statutes, Burn's J. *Police*, Metropolis.

(q) 10 G. 4, c. 44, s. 7.

(r) As the power of *other* persons to apprehend was not repeated in 10 G. 4, c. 44, s. 7, it may be collected that it was considered dangerous to continue that power, and perhaps in respect of the case mentioned in the next note.

(s) *Cowles* v. *Dunbar*, 1 M. & M. 37; 2 Car. & P. 565, S. C., decided on the preceding act, 3 G. 4, c. 55, s. 2.

(t) See Vagrant Act, 5 G. 4, c. 83, s. 3, 4, 5; see them well analyzed and stated, Burn's J. 26 ed. tit. Vagrant, and *infra*.

The 5 G. 4, c. 83, s. 3, enacts—1. "That every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family, whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place;"

2. "Every person returning to and becoming chargeable in any parish, township, or place, from whence he or she shall have been legally removed by order of two justices of the peace, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him or her to be settled in such other parish, township, or place;"

3. "Every petty chapman or pedlar wandering abroad and trading, without being duly licensed, or otherwise authorized by law;"

4. "Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner;"

5. "And every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do;"

person whatsoever to apprehend any person *who shall be found offending* against that act," (as *inter alia* "*being found* in or

6. [And every person asking alms unde ertificate or other instrument prohibited by the act, s. 16;]*

"Shall be deemed an *idle and disorderly person* within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month."

By the 5 Geo. 4, c. 83, s. 4, it is enacted, "that every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person;"

2. "Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects;"

3. "Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself;"

4. "Every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition;"

5. "Every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female;"

6. "Every person wandering abroad, and endeavouring, by the exposure of wounds or deformities, to obtain or gather alms;"

7. "Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;"

8. "Every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they, or any of them, shall become chargeable to any parish, township, or place;"

9. "Every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game, or pretended game of chance;"*

10. "Every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act;"†

11. "Every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose."‡

12. "Every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony;"

13. "And every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace-officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended;" §

"Shall be deemed a *rogue and vagabond*, within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit, and other implement, and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to the king's majesty."

By the 5 Geo. 4, c. 83, s. 5, it is enacted, 1. "That every person breaking or escaping out of any place of legal confinement before the expiration of the term for which he or she shall have been committed or ordered to be confined by virtue of this act;"

* In *Rex* v. *Clarke*, 1 Cowp. 35, it was held, that playing bowls was not within the 17 Geo. 2, c. 5, s. 2.

† See *Rex* v. *Howarth*, R. & M., C.C. 207.

‡ And see 4 Geo. 4, c. 64, s. 7.

§ See another instance in s. 15.

upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, *for any unlawful purpose*," (u) and forthwith to take and convey him before a justice of the peace, to be dealt with as therein mentioned. (u) Upon the vagrant act it has been held that a man may be arrested without warrant, as a person "*found in a dwelling-house*, for an unlawful purpose," if he have been *seen* in the house, although before apprehension he has got out, and was afterwards taken on fresh pursuit; and that it makes no difference that he was not seen getting out of the house, if he was found concealing himself to avoid being apprehended, and that to make such arrest legal, it is not necessary that the person should have at the time he was arrested a *continuing* purpose to commit a felony, and that be may be arrested, though the unlawful purpose had wholly ended; and it was also held, that where the circumstances are such that a man must know why he is about to be apprehended, he need not be told why, and his resistance of arrest will be illegal. (x)

Apprehension under the act against larcenies and petty takings, 7 & 8 G. 4, c. 29.

The statute against *larcenies and petty takings* of personal or real property, (y) contains special provisions, enabling the person entrusted with the care of *Deer*, and for any of his assistants, whether on his premises or not, to demand from any person who has entered into the grounds therein mentioned, with intent unlawfully to take deer, any gun or engine in his

2. "Every person committing any offence against this act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof;"

3. "And every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace-officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended;"

"Shall be deemed an *incorrigible rogue* within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him, by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses,) to the house of correction, there to remain until the next general or quarter-sessions of the peace; and every such offender who shall be so committed to the house of correction shall be there kept to hard labour during the period of his or her imprisonment."

(u) Id. s. 6. See the very able and acute observations on the Vagrant Act by Mr. Adolphus, published A. D. 1824, showing the undefined, unlimited, and dangerous powers given by that act, and the indiscreet or malevolent exercise of which so frequently give rise to the most vexatious imprisonment and subsequent litigation. It will be found that, under that act, the *mere suspicion* of a *propensity* to commit a trifling offence is punishable, by a single magistrate, with three calendar months' imprisonment, without the power of obtaining release upon finding the most satisfactory sureties for his good behaviour. And this power is too frequently enforced. If the occupier of an area should, even in the day time, discover a person there without his leave, for a temporary purpose, or courting his servant, or otherwise, as a trespasser, he might, under this act, apprehend him, and a magistrate might commit him absolutely to prison for three calendar months. What a monstrous power to vest in private individuals, or even in a magistrate!

(x) *Rex* v. *Haworth* R. & M. C. C. 207; and see *Hanway* v. *Boultbee*, 2 Mood. & M. 15, fully stated, *post*, 625.

(y) 7 & 8 G. 4, c. 29.

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possession, and any dog *there brought* for hunting such deer, and in case the same be not *immediately* delivered up, to take the same from him *in any of the places named*, or *upon pursuit made* in any other place to which he may have escaped therefrom, for the use of the owner of the deer. (z) Another section (a) enacts, that if any person shall at any time be *found fishing in the waters* enumerated, and against the provisions of that act, it shall be lawful for the owner of the ground, water, or fishery, where such offender shall *be so found*, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not *immediately deliver up the same*, to seize and take the same from him for the use of such owner, but provides that any person angling in the day time, against the provisions of the act, from whom any implements used by anglers shall be taken, by whom the same shall be delivered up as aforesaid, shall, by the taking or delivering thereof, be exempted from the payment of any damages or penalty for such damages. (b)

Then follows a general provision (c) for the apprehension without warrant of offenders *found committing* any offence punishable under that act, either by indictment or a summary conviction, excepting only angling in the day time, and which apprehension, it is provided, may be made without warrant by any peace officer, or by the *owner of the property*, on or with respect to which the offence shall be committed, *or by his servant or any person authorized by him*, and the offender is forthwith to be taken before some neighbouring justice to be dealt with according to law.

Apprehensions under the act against malicious injuries to property, 7 & 8 Geo. 4, c. 30, s. 28.

The 7 & 8 Geo. 4, c. 30, s. 28, *against malicious and wilful injuries to property*, contains a power to apprehend any person "*found committing*" any offence against that act, whether punishable by indictment or upon summary conviction, and by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him. (d) To justify the apprehension by a private individual without warrant, under this act, the offender must, in general, be *found* by him in the *actual commission* of the offence, and taken at the

(z) 7 & Geo. 4, c. 29, s. 29. It will be observed, this act extends to assistant keepers, and requires a demand, which the prior act did not. See *Rex* v. *Amy*, Russ. & Ry. 500.

(a) 7 & 8 Geo. 4, c. 29, s. 35.

(b) See 2 Burn's J. 760, &c.

(c) 7 & 8 Geo. 4, c. 29, s. 63.

(d) See cases on this act. 3 Burn's J. 741, 742, 26 ed.

time, (e) and the party must be then doing *actual damage;* and it has been held that the mere fact of a man's treading down the grass by walking in a field out of a lawful footway, is not sufficient to justify an apprehension or conviction, (f) and the offender must at least be acting *wilfully.* (g) But if the offender be taken upon fresh pursuit his apprehension would be legal. (h) Under the last-mentioned section there is a recent decision (h) affording a useful construction of the words "*found committing*" any offence in this or any other act. It was held, that if a person unreasonably beat and *materially* injure a small dog, under colour or pretence of self-defence against the dog's barking at him, such injury is wilful, within the meaning of the 24th section, and, that although he had gone off to the distance of a mile, yet upon *immediate pursuit,* he might be legally apprehended and taken before a magistrate; and Tindal, C. J. said, "with respect to this question, the words of the 7 & 8 Geo. 4, c. 30, s. 24 & 28, certainly differ materially from those of 1 Geo. 4, and were obviously meant to restrict the powers given by that act. The object of the legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature, *because otherwise such offences would frequently be committed by persons passing through, or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalites of a charge before a magistrate, or a warrant.* Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from 1 Geo. 4, c. 56, (i) and does not allow a *stale* apprehension on an old charge without a warrant. Still the words of the present statute must not be taken *so strictly* as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made, I think that would be sufficient; so in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence

(e) See *Rex* v. *Curran,* 3 Car. & P. 397, and *Rex* v. *Howarth,* R. & M. C. C. 207; *Beechey* v. *Sides,* 9 Bar. & C. 806, as to the words "*found committing,*" *Attorney General* v. *Delano,* 1 Price, 383; and *Hanway* v. *Boultbee and Wife,* 2 Mood. & M. 15.

(f) *Butler* v. *Turley,* 2 Car. & P. 585; *Dewey* v. *White,* M. & M. 54, 56.

(g) *Rex* v. *Turner,* R. & M. C. C. 239.

(h) *Hanway* v. *Boultbee,* 2 Mood. & M. 15; 4 Car. & P. 350, S. C.

(i) Repealed by 7 & 8 Geo. 4, c. 27.

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could be required, and that being the case, I think it must be treated as an "*immediate apprehension,*" for an offence which the plaintiff (supposing under the circumstances that it was an offence at all) was "*found committing.*" (*k*)

Apprehensions under 9 Geo. 4, c. 69, s. 2, against Night Poachers.

The 9 Geo. 4, c. 69, sect. 2, against *Night Poaching*, provides, "that where any person shall be *found* (*l*) *upon any land committing any such offence* as is hereinbefore mentioned, (*m*) it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for the gamekeepers *or servant* of any of the persons herein mentioned, *or any person assisting such gamekeeper. or servant* to seize and apprehend such offender upon such land, or in case of *pursuit* being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace." The act provides against assaults and resistance of such apprehension, (*n*) by enacting "That in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor," and on conviction be transported for seven years, or imprisoned, with hard labour, for not exceeding two years. But under this clause it has been held, that a stick or bludgeon *not taken out* by the offender for the purpose of attack, is not *an offensive weapon* within the meaning of the act. (*n*)

It has been decided under this act, that if gamekeepers attempt to apprehend persons armed with offensive weapons, who are poaching in the night, and one of the gamekeepers be shot by one of the poachers, this will be murder in all, unless it be shown that either of the poachers separated himself from the rest, so as to show that he did not join in the act; (*o*) and

(*k*) *Supra*, 625, note (*h*).

(*l*) In *Attorney General* v. *Delano*, 1 Price Rep. 383, the word "*found*" means "having been *seen* or *discovered*," and see *ante*, 625, note (*h*), and *Rex* v. *Barkart*, R. & M. C. C. 151 : 10 Bar. & C. 89, S. C.

(*m*) See the sections, *ante* 401 to 403. The act is confined to *Night* Poaching, therein defined.

(*n*) See enactments, *ante*, 401 to 403; and see 2 Burn's J. 26 ed. 927, &c.; and see Carrington's Criminal Law, 147. It has been held that a stick or bludgeon, not taken out for the purpose of attack, is not an "offensive weapon" within that act, *Rex* v. *Palmer*, 2 Mood. & M. 70.

(*o*) *Rex* v. *Edmeads*, 3 Car. & P. 390; *Rex* v. *White*, Russ. & Ry. C. C. 99.

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where gamekeepers had seized two persons who were poaching in the night, and they having surrendered, called to a third, who came up, and he killed one of the gamekeepers, it was held to be murder in all, though the two struck no blow, and though the gamekeepers had not announced in what capacity they had apprehended him. (*p*)

Apprehension of trespassers under the Game Act, 1 & 2 Wm. 4, c. 32, s. 31, ante, 405.

The *Game Act*, 1 & 2 Wm. 4, c. 32, s. 31, enables the person entitled to the game, or any person by his order, to apprehend and detain for not more than twelve hours, and take before a justice, " any person *found on any land in search or pursuit of game*, and refusing to tell his real name or place of abode, or by giving so general a description as to be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land; (*q*) and *game fresh killed* in the possession of such a trespasser whilst trespassing, may be seized for the use of the owner of the game. (*r*)

It will be observed that many of these acts also give power to *seize* guns, nets, fishing tackle and dogs for the use of the owner of the property injured by the offence. In such a case, after the seizure, the property may be destroyed, because the new owner may do what he pleases with it, and he may therefore kill a dog so seized; (*s*) but if the property is merely to be seized or to be taken as a distress, then at common law any injury to it would render the party seizing a trespasser *ab initio*, as where a party cuts nets which he had taken damage feasant. (*t*)

It will be found that the principle of these modern acts authorizing private persons to apprehend offenders is not new, but will be found in the ancient acts respecting offences in forests and parks, and in the General Highway Act, (*u*) Turnpike Act, (*x*) and in most of the local Paving and Police Acts, in order to secure transient offenders.

General protection to persons apprehending offenders afforded by 9 Geo. 4, c. 31, s. 12, *against criminal resist-*

Besides the particular protections sometimes expressly given by each of these several acts to persons *lawfully* apprehending offenders, the general act for the protection of the person, 9 G. 4, c. 31, s. 12, expressly enacts, " that if any person shall unlawfully " and maliciously shoot at any person, or shall by drawing a " trigger or in any other manner attempt to discharge any kind " of loaded arms at any person, or shall unlawfully and mali- " ciously stab, cut or wound any person, with intent to maim,

(*p*) *Rex* v. *Whitorne*, 3 Car. & P. 394.
(*q*) 1 & 2 Wm. 4, c. 32, s. 31.
(*r*) Id. sect. 36.
(*s*) *Kingsnorth* v. *Bretton*, 5 Taunt. 416; 1 Marsh. 106, S. C.
(*t*) *Tyler* v. *Wall*, Cro. Car. 228.
(*u*) 13 Geo. 3, c. 78, s. 60.
(*x*) 3 Geo. 4, c. 126.

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"disfigure or disable such person, or to do him some other "grievous bodily harm, *or with intent to resist or prevent the "lawful apprehension or detainer of the party so offending, "or of any of his accomplices, for any offence for which "he or they may respectively be liable by law to be appre-"hended or detained,* every such offender and every person "counselling, aiding or abetting such offender, shall be guilty "of felony, and being convicted thereof *shall suffer death as "a felon."* But then the act provides, "that in case it shall "appear on the trial of any person indicted for any of the "said offences, that such acts of shooting or of attempting to "discharge loaded arms, or of stabbing, cutting or wounding "as aforesaid, were committed under such circumstances that "if death had ensued therefrom the same *would not in law "have amounted to the crime of murder*, in every such case the "person so indicted shall be acquitted of felony." (*y*)

When parties apprehending offenders are not protected.

It has been held that the powers given by acts of this description authorizing the taking of certain description of persons, or to search by warrant suspected houses of a certain description, are *strictly confined to such persons and such houses*, and that if a person be taken not answering the description, then the arrest, even under a general warrant against such persons or houses, will be illegal, and subject the parties to an action of trespass. (*z*) And even killing in resistance of the arrest would, in that case, only be manslaughter and not murder. (*a*) Therefore where a writ of assistance was addressed to certain officers therein mentioned, and under the 6 Geo. 4, c. 108, s. 40, directed them to enter and search any house, shop, &c. where smuggled goods were or were suspected to be concealed, it was held that such writ did not confer a general and absolute authority to enter and search all houses for smuggled goods, but that such entry and search

(*y*) It has been correctly observed, that it is rather to be regretted that in indictments for these offences, the legislature did not give the jury a power of finding the party guilty of the stabbing, &c. and that if death had ensued, the crime would have been *manslaughter*, and then have subjected the offender to a *smaller punishment*; for at present if a person is tried for stabbing, &c. and it appears that if death had ensued, it would have been only an aggravated case of manslaughter, the prisoner is *acquitted* and gets discharged from custody without *any punishment whatever*. It is true that an indictment for *an assault* might be preferred against him, but as the grand jury are generally discharged before the trial takes place on the capital charge, such an indictment is in practice never preferred. See Carr. Crim. L. 3d edit. 239; and see *The King* v. *Edwards*, *post*, 629, n. (*d*); and *The King* v. *Newell and others*, *post*, 629, n. (*e*); *Rex* v. *Curran*, 3 Car. & P. 397.

(*z*) *Rex* v. *Adey*, 1 Leach, 208; and see *Cowles* v. *Dunbar*, 1 M. & M. 37; 2 Car. & P. 565, S. C.; Hawk. b. 2, c. 13, s. 31; *Handcock* v. *Baker*, 2 Bos. & Pul. 262; *Bell* v. *Oakley and others*, 2 M. & S. 261; *Brady's case*, 1 Leach, 329.

(*a*) 1 East, P. C. 303, 313, 325; *Tooley's case*, 2 Ld. Raym. 1296, 1301; 2 Hale, 89.

must be justified by reference to the event, or at least to probable cause, and that if there appeared to be no probable cause the entry was illegal and might be resisted, and the officers legally obstructed. (*b*)

So in a late case it was held, that although the Game Act, 1 & 2 Wm. 4, c. 32, authorizes the apprehending and detaining for twelve hours persons *found trespassing* in pursuit of game in the day time, when he refuses to communicate his name, any apprehension in *the day time* in *other* cases would be illegal, and that if the party making it should be resisted and hurt, the trespasser would not be indictable under the 9 Geo. 4, c. 31, s. 12, for his resistance and occasioning them grievous bodily harm, and if death had ensued, the offence of killing would not have amounted to *murder;* (*c*) and that, consequently, the cutting, &c. was not an offence within 9 Geo. 4, c. 31, s. 12. (*d*)

So in another recent case, where the prisoners were indicted under the 9 Geo. 4, c. 31, s. 12, for feloniously cutting the prosecutor, and it appeared that they had been seen by the prosecutor under suspicious circumstances coming out of a cattle shed, and the prosecutor thereupon went into his house to fetch his pistols, and the prisoners in the mean time having got off the premises into *an adjoining field*, and they, upon being challenged, gave fictitious names, and thereupon he attempted to seize them there and they cut him, it was held that under the Vagrant Act he was only justified in apprehending the prisoners *when found in the shed* and *not in the field*, and that, consequently, their cutting in resistance of the illegal apprehension was not indictable. (*e*)

(*b*) *Rex* v. *Watts*, 1 Bar. & Adolp. 166; and see *Warne* v. *Valley*, 6 T. R. 443, as to the strictness required in construing statutes which give power of search and seizure.

(*c*) *Ante*, 627, 628.

(*d*) *Rex* v. *Edwards*, 2 March, 1833, *cor.* Lord Lyndhurst, at Hertford; and see observations in Carr. Crim. L. 3d edit. 239; *ante*, 628, note (*y*); see also *Rex* v. *Curran*, 3 Car. & P. 397.

(*e*) *The King* v. *Newell and J. and E. Speller*, Chelmsford, 7th March, 1833, *cor.* Tindal, C. J. The prisoners were indicted under 9 Geo. 4, c. 31, s. 11 & 12, for feloniously cutting *P. Felton*. The facts of the case were these:—The prosecutor was sitting at his father's house on the night of the 17th of January, when, about ten at night, the yard-dog barked violently. He immediately went out, and from the circumstance of the dog continuing to bark he was convinced that some person was about the premises. He called out several times, and then saw the three prisoners come forth from the cattle-shed. They were all armed with bludgeons, and had each a bag under his arm. He insisted on knowing their names, but they refused to tell him. The prosecutor perceiving that there were three persons armed, and that he could not attempt to cope with them unarmed, returned into the house to get his pistols. Having procured them, he went out into the yard. The prisoners had then gone off the premises, and were in a field through which a footpath ran. He went up to them and insisted on knowing their names. Two of them gave pretended names, and the third did not speak. At this time the brother of the prosecutor came up. The latter then attempted to take one of the prisoners. On this they called out that

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Preferable to obtain a warrant.

In all cases, therefore, when it is doubtful whether the party has committed a felony, and when it is doubtful whether he comes within the general description either in the acts referred to or in the warrant, the safest course is to wait until a *particular* warrant has been obtained against the particular person, in which case, although it should afterwards appear that he was innocent, he cannot maintain any action unless he can prove that the charge was maliciously made against him without any reasonable cause, whereas when the proceedings have been without warrant, he may *primâ facie* support an action of trespass; (*f*) and if the magistrate should erroneously issue a warrant when he ought not, the party procuring it would not be liable. (*g*)

Protection of persons apprehending from *actions*.

However, in general, not only officers but private persons who apprehend supposed offenders without warrant, have *adequate protections* against or means of getting rid of *civil actions* for any irregularity, when they have acted *bonâ fide* without malice, but have either mistaken the offence, or the person, or the regularity of their proceeding; we have already adverted to the protection in general afforded by the acts against larceny and other offences of that nature, and against malicious or wilful injuries to property, (*h*) and other acts professedly passed for the *protection* of persons acting *in the execution* of the respective acts, and which terms have been construed to protect persons in the *bonâ fide*, though mistaken, exercise of the powers given by the particular act, and not to be confined to persons who have strictly acted as authorized, who would in that case not require any protection. (*i*) These require a *notice of action*

they would not be taken, and a severe blow was struck at the prosecutor on the back of his neck. This brought him to the ground, and there he was struck several times. When he got up he fired both pistols, but neither of the balls took effect. He and his brother were then beaten so unmercifully that they were unable to see for the streaming of the blood of their heads into their eyes. They remained senseless for some time, and on recovering, the prisoners were gone.

Lord Chief Justice Tindal thought, that although under the 5th of Geo. 4, c. 83, (the Vagrant Act,) the prisoners might have been seized *on the premises* of the prosecutor, it was not competent for him to seize them when they were *off the premises and in a field through which there was a path*. The resistance which the prisoners had made, though excessive, and the subject of an indictment for an assault, would not come within the statute, 9 Geo. 4, c. 31, s. 12; for if death had ensued, the prisoners' offence would not have amounted to *murder*.

The jury, under his lordship's direction, returned a verdict of *not guilty* as to all the prisoners; see also *Rex* v. *Curran*, 3 Car. & P. 397.

(*f*) 7 & 8 Geo. 4, c. 29, s. 75.

(*g*) *Leigh* v. *Webb*, 3 Esp. R. 166; *Belk* v. *Broadbent*, 3 T. R. 185; *Boote* v. *Cooper*, 1 T. R. 535; but see *Elsee* v. *Smith*, 1 Dowl. & R. 97; 2 Chit. R. 304; as to the liability to an action on the case for *maliciously* inducing a magistrate improperly to issue a warrant.

(*h*) 7 & 8 Geo. 4, c. 30, s. 41; *Wright* v. *Wales*, 5 Bing. 336; 2 Moore & P. 613, S. C; and as to costs, 3 Moore & P. 96, S. C.

(*i*) *Beeching* v. *Sides*, 9 Bar. & C. 806; *Cook* v. *Leonard*, 6 B. & C. 355; *Wright* v. *Wales*, 5 Bing. 336; 2 Moore & P. 613; 3 Moore & P. 96, S. C.; see the

and other formal steps on the part of any person suing them, and authorize a *tender of amends* on the *payment* of the amount *into court*, and deprive the plaintiff of costs although he should recover a verdict, unless the judge should certify his approbation of the action and also of the verdict obtained thereupon. (*k*)

Consideration of the expediency of these powers of apprehension.

It may be objected that these are strong measures against the liberty of the subject, allowing *private individuals* of their own accord to imprison others, and then imposing such qualifications upon the remedy in case of false or irregular imprisonment as to render recovery very hazardous; but on the other hand it will be remembered, that in a crowded and demoralized population there are so many transient offenders who would escape if not immediately apprehended, that it is absolutely essential for the protection of property that such apprehensions should be allowed; (*l*) and supposing there should be any mistake, error or irregularity, the party imprisoned ought to be satisfied by a tender of sufficient amends; and admitting that he has been maliciously, hastily or otherwise improperly apprehended, and that he has thereby really sustained considerable damage, there is no danger of a jury's not giving him adequate compensation, or of a judge declining in such a case to certify his approbation of the action, and also of the verdict obtained thereupon, when given temperately and not for excessive damages.

Better to act under a special warrant. (*m*)

However, notwithstanding these strong powers and protections, it is for the reasons just urged recommended that where time will allow, the party be proceeded against by regular warrant, founded upon information of the offence taken on oath, especially when the offender is known and might afterwards be apprehended under a warrant and by regular officers, who would probably better know how to effect a capture, and who being known officers would probably prevent resistance. (*n*) It may be expedient that offenders should know that they are at night and at all times liable to be apprehended when they are *found committing* an offence, and that they will be guilty of felony if they wil-

older cases, *Greenway* v. *Hurd*, 4 T. R. 555; *Weller* v. *Took*, 9 East, 364; *Briggs* v. *Evelyn*, 2 Hen. Bla. 114. But where a watchman being authorized under a local act to apprehend all *vagrants found wandering*, apprehended not the person but the animal conducted by him, after it had ceased to be a nuisance in the street and when the same was in a stable; it was held, that the watchman was not entitled to the protection of the act, being so gross a deviation from the authority given as not to be *bonâ fide* done; *Cook* v. *Leonard*, 6 B. & C. 355; and see *Morgan* v. *Palmer*, 2 B. & C. 729; *Gaby* v. *Wilts Canal Company*, 3 M. & S. 580; *Irving* v. *Wilson*, 4 T. R. 485.

(*k*) See 7 & 8 Geo. 4, c. 29, s. 75; and Id. c. 30, s. 41.

(*l*) *Per* Tindal, C. J. in *Hanway* v. *Boultbee*, 2 Mood. & M. 15, and 4 Car. & P. 350, S. C. *ante*.

(*m*) *Ante*, 630.

(*n*) *Per* Tindal, C. J. *ante*, 625, note (*h*).

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fully injure a person in resisting apprehension; but it deserves much consideration whether it can be morally proper that, for the sake of preserving game or other property from any offence less than burglary or arson, man, especially when armed, should, without formal warrant, be placed in personal competition and conflict with man.

Of the necessity for notifying the ground or reason for the apprehension.

Whenever an officer or a private individual acts, with or without a warrant, he should *in all cases* take care to *notify* in the first instance his authority to the party about to be apprehended, for otherwise his resistance might be excused, excepting in the case of a *known* constable or peace officer, or where the ground of the arrest is already sufficiently known to the offender,(*n*) as where he is found in an inclosed area or yard for an unlawful purpose.(*o*) It was therefore held to be no offence within the clause in Lord Ellenborough's Act, 43 Geo. 3, c. 58, against maliciously cutting, with intent to resist lawful apprehension, if the cutting took place in an attempt to apprehend the prisoner previous to *any notification* being made to him of the purpose for which he was laid hold of; and *per* Lawrence, J. "If death had ensued it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different complexion.(*p*) Every officer should, when attempting to apprehend a supposed felon, declare that he is an officer, and the object of his proceeding, for otherwise a forcible resistance may not be criminal, or so criminal as it otherwise would be; thus it was holden not felony under the 43 Geo. 3, c. 58, to cut an officer about to arrest the party, but who did not declare his business.(*q*) But if a constable, acting within his district, where he is *generally known*, produce his staff of office, the law will presume that the party to be apprehended had notice of his intent without any express verbal notice; and it is sufficient for a constable to say, he arrests *in the king's name*.(*r*) And where the party knows the officer and his business, the law requires no express notice to be given; as where the prisoner drew his sword upon a bailiff, who came to arrest him, and said, "stand off, I know you well enough—come at your peril;" and upon the bailiff immediately taking hold of him, without using words of arrest or showing any warrant, the prisoner killed him, this was holden to be murder.(*s*)

(*n*) *Mackally's case*, 1 Hale, 583, 589; 1 East, P. C. 315; 9 Co. 69, S. C; *Rex* v. *Howarth*, Ry. & M. C. C. 207.

(*o*) *Rex* v. *Howarth*, R. & M. C. C. 207; but see 1 East, P. C. 306.

(*p*) *Gordon's case*, 1 East, P. C. 315.

(*q*) *Rex* v. *Rickets*, 3 Campb. 68.

(*r*) 1 Hale, 583.

(*s*) *Pew's case*, Cro. Car. 183.

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What to be done by a private person or constable immediately after the apprehension.

When a private person has apprehended an offender at common law for a supposed felony, he should immediately, or as soon as practicable, deliver over the prisoner to a constable, or convey him before a magistrate, or to any gaol in the county. (t) But the preferable course is to see that he be taken as soon as practicable before a magistrate. (u) A constable must take any prisoner before a magistrate to be examined as soon as possible. (x) But if the apprehension be at night, and during the hours of rest, then the prisoner may be taken out of his home and placed during the night in a secure prison until the earliest hour of business the next morning. (y) But the party must not be handcuffed, much less beaten, unless there be resistance or real danger of rescue. (z) And where there has been an arrest without warrant for a mere assault, and not for a felony, the constable may, if the party be well known and there be no danger of absconding, take his word. (a) Where the apprehension has been by a private person or officer, under the expressed powers of the foregoing acts, they sometimes particularly direct what shall be done with the person apprehended, (b) as "that he shall be *forthwith* taken before some neighbouring justice of the peace, to be dealt with according to law;" (b) or in the Game Act, "as soon as conveniently may be, and at all events within twelve hours after the first apprehension. (c) And the Vagrant Act is in the alternative, that the party "shall be forthwith taken before some justice of the peace, or be delivered to a constable or peace officer of the place where taken by him, to be conveyed before a justice." (d)

V. Of resistance of imprisonment, and when an escape, rescue or prison-breaking is lawful, and when if death or personal injury ensue, the same will be punishable, and how.

1. By party himself.

V. Where persons having *lawful* authority to arrest, apprehend, or imprison, or otherwise to advance or execute the public justice of the kingdom, either civil or criminal, and using the proper means for that purpose, are resisted in so doing, not only is such resistance of itself illegal and punishable at *common law*, (e) but if the party illegally resisting, or any other assisting him, be killed in the struggle, such homicide is *justifiable*; (e) whilst on the other hand if the party having such authority, and executing it properly, happen to be killed, it will

(t) 1 Hale, P. C. 589; 2 Hale, 77.
(u) Id. ibid.; *Rex* v. *Hunt*, R. & M. C. C. 93; *Rex* v. *Curran*, 3 Car. & P. 397; *Davis* v. *Capper*, 10 Bar. & Cres. 28.
(x) *Wright* v. *Court*, 4 Bar. & Cres. 596; 6 Dowl. & R. 623, S. C.
(y) *Davis* v. *Russell*, 5 Bing. 354.
(z) *Wright* v. *Court*, 4 Bar. & Cres. 596; 6 Dowl. & R. 623, S. C.; 2 Hale, 119 to 126, 195.
(a) *Hardy* v. *Murphy*, 1 Esp. R. 295; *Arrowsmith* v. *Le Mesurier*, 2 New R. 211; 1 Chit. Cr. L. 59.
(b) 7 & 8 Geo. 4, c. 29, s. 63, and c. 30, s. 28.
(c) 1 & 2 Wm. 4, c. 32, s. 31.
(d) 5 Geo. 4, c. 83, s. 6.
(e) 1 East, P. C. 305.

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at common law be murder in all who take a part in such resistance.(*f*) Several acts have from time to time been passed in affirmance of such common law rule, and defining and prescribing the punishment of the resistance of lawful authority,(*g*) and we have seen that the 9 Geo. 4, c. 31, s. 12, in particular, punishes *with death*, as a capital felony, various *malicious injuries* to the person, committed in resistance of *lawful* imprisonment, although death do not ensue.(*h*)

But it will be found that the common law, and all these acts, either expressly or implied, suppose that the arrest or imprisonment has been *lawful*, (*i*) and therefore an indictment or prosecution for the resistance, (*k*) or rescue, or prison breaking, must show the nature and cause of the imprisonment from which the party escaped or was rescued, in order that it may appear that the escape or rescue was illegal. (*l*) Therefore, where upon an indictment upon the 16 Geo. 2, c. 31, for facilitating the escape of another, it appeared that the latter was committed and imprisoned only upon *suspicion* of felony, the judges after conviction held the case not within that act, which related only to commitment for treason, or *felony clearly and plainly* expressed in the warrant; (*m*) and which decision occasioned the 1 &2 Geo. 4, c. 88, making it punishable to rescue, or assist in rescuing, any person whether imprisoned for felony *or suspicion thereof*. So in a recent case the judges were of opinion, upon an information for assaulting and obstructing officers of the customs in the execution of their duty, in attempting to enter a house and search it for smuggled goods under a writ of assistance, that the defendants must be acquitted, if the officers had not at least probable cause for suspecting that smuggled goods were there. (*n*)

It seems, therefore, to be clearly established, that if an officer, or person endeavouring to make an arrest or enter a house, had not *legal authority* for that purpose, or if in certain cases he abuse such authority, and do more than he was authorized to do, or if it turn out in the result that he had no right to enter, (*o*) then the party about to be imprisoned, or

(*f*) Fost. 270, 308; 1 Hale, 457; 1 East, P. C. 305.

(*g*) 1 & 2 Geo. 4, c. 88; 4 Geo. 4, c. 64; 5 Geo. 4, c. 54, s. 3; 9 Geo. 4, c. 31; ch. 83, s. 5; see Burn's J. titles Escape, Prison Breaking, Rescue; *Rex* v. *Haswell*, R. & R. C. C. 458; *Rex* v. *Stokes*, 5 Car. & P. 148; *Rex* v. *Bright*, 4 Car. & P. 387.

(*h*) See sect. 12; *ante*, 627, 628.

(*i*) 1 & 2 Geo. 4, c. 88; 4 Geo. 4, c. 64; 5 Geo. 4, c. 54, s. 3; Id. c. 83, s. 5; 9 Geo. 4, c. 31; Burn's J. Escape, Prison Breaking, Rescue; *Rex* v. *Haswell*, R. & R. C. C. 458; *Rex* v. *Stokes*, 5 Car. & P. 148; *Rex* v. *Bright*, 4 Car. & P. 387.

(*k*) *Rex* v. *Bright*, 4 Car. & P. 387.

(*l*) Hawk. c. 21, s. 5.

(*m*) *Rex* v. *Walker*, 1 Leach, C. L. 97; *Rex* v. *Greenruff*, 1 Leach, C. L. 363.

(*n*) *Rex* v. *Watts*, 1 B. & Adolp. 165.

(*o*) *Cooke* v. *Birt*, 5 Taunt. 765; *Rex* v. *Watts and others*, 1 B. & Adolp. 166.

whose house is about to be illegally entered, may resist the *illegal imprisonment* or entry by self defence, not using any deadly or dangerous weapon, and may escape or be rescued, or even break prison, (*p*) and others may assist him in so doing. (*q*) And although he would not be *justified* in killing the officer, unless he threatened him with immediate loss of life or forcible felony, yet the homicide in resisting the unlawful imprisonment or forcible trespass in the house will only be manslaughter. (*r*)

So if the warrant were illegal, the officer is not guilty of an escape by suffering the prisoner to go at large; and it seems to be a good general rule, that wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. (*s*)

There are also other cases where imprisonment may be safely resisted; as if it be well ascertained that the process to arrest has had the name of the party or of the officer inserted without authority by an improper person, and after the delivery of the

(*p*) 1 East, P. C. 295; 1 Hale, 457, 461, 465, 583, 599; and see the words of 1 & 2 Geo. 4, c. 88, as to rescue from *lawful* imprisonment.

(*q*) *Rex* v. *Osmar*, 5 East, 304, 308; 1 Smith's R. 555, S. C. An indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of record of *P.* issued their writ directed to *T. B.*, one of the serjeants at mace of the said *town and county*, to arrest *W.*, by virtue of which *T. B.* was proceeding to arrest *W.* within the jurisdiction of the said court, but that the defendant assaulted *T. B.* in the *due execution of his office*, and prevented the arrest; and it was held that such indictment was bad, it not appearing that *T. B.* was an officer of the *court;* and that there could not be judgment after a general verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been, that the officer was attempting to make *an illegal arrest* of another, which being a breach of the peace, the defendant might, for aught appeared, have lawfully interfered to prevent it. Lord Ellenborough, C. J. "*If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it,* doing no more *than is necessary* for *that* purpose, and nothing further appears in this case to have been done;" the other judges agreed, and therefore the judgment was arrested.

In *Cole* v. *Hindson and three others*, 6 Term Rep. 234, 236, it was held, that a plea of justification by an officer (for trespass for taking the goods of *A. B.*), that he took them under a *distringas* against *C. B.* (meaning the said *A. B.*) to compel an appearance, with an averment that *A. B.* and *C. B.* are the same persons, cannot be supported; and Lawrence, J. observed, "In Foster, C. L. 312, it is said, if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed, or if the name of such person or the officer be inserted without authority, and after the issuing of the process, or the officer exceed the limits of his authority and be killed, this will amount to no more than manslaughter in the person whose liberty is so invaded;" evidently showing that in such cases the officer is a trespasser.

Housin v. *Barrow*, 6 T. R. 122, the sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted the name of *C.*, and it was held that the warrant was illegal, and the arrest by *C.* consequently void, 2 Wils. 47, S. P.; *Rex* v. *Stockley*, 1 East, P. C. 310, S. P.

(*r*) 1 East, P. C. 295; 1 Hale, 457, 464, 465, 583, 599; and see the words of 1 & 2 Geo. 4, c. 88, as to rescues from *lawful* imprisonment; and see *ante*, 634, note (*m*).

(*s*) Hawk. b. 2, c. 19, s. 1 & 2.

process to the inferior officer to be executed, and such officer, in attempting to execute it, be killed, this is only manslaughter in the party whose liberty is invaded. (*t*) So if a person, not an officer of an inferior court, attempt to arrest a party under its process, a third party may with impunity rescue the person arrested, he doing no more than was necessary for that purpose. (*u*) So if the process be defective in the frame of it, as if there be such a mistake in the name of the party to be arrested as renders it illegal to execute it, and the officer be killed, it would only be manslaughter. (*x*) So where an escape warrant had been issued in blank, and afterwards the proper name was inserted by a person not legally authorized, and the officer was killed by the party to be arrested, it was held that he was only guilty of manslaughter. (*y*) And in an action on the case for the rescue of a person arrested under mesne process, it is necessary to aver and prove that the process was legal, although perhaps a general averment that the party was legally in custody might suffice. (*z*)

So no action of debt for an escape after judgment can be supported against the marshal or other officer, unless the party escaping were legally in his custody. (*a*) So if an officer abuse the process; as if he attempt to break open the *outer door* of the defendant's house in order to arrest him on mesne process, and not for a breach of the peace, and the latter, knowing the officer's purpose, fire through the door and kill him, that would only amount to manslaughter. (*b*) But it is no objection to the legality of a writ of *habere facias possessionem*, or other process, that the names of the officers to whom it is directed were inserted by interlineation after the writ was sealed, but while it remained unexecuted in the hands of the under-sheriff. (*c*)

We have seen that a person can only justify the shooting at or killing another when a *forcible felony* is about to be com-

(*t*) *Housin* v. *Barrow*, 6 T. R. 122; *ante*, 635, n. (*q*); *Pedley's case*, 1 Leach, 245; *Rex* v. *Osmer*, 5 East, 308; 1 East, P. C. 310; *Bertshem* v. *Fern*, 2 Wils. 47, S. P.

(*u*) *Rex* v. *Osmer*, 5 East, 304, 308; 1 Smith's R. 555, S. C.; *ante*, 635, n. (*q*).

(*x*) *Cole* v. *Hindson*, 6 T. R. 234; Foster, 312; *ante*.

(*y*) *Rex* v. *Stockley*, 1 East, P. C. 310; *Housin* v. *Barrow*, 6 T. R. 123; *aliter*, if the proper name was filled in after signed or sealed but *by the proper officer*, *Bertshem* v. *Fern*, 2 Wils. 47, S. P.; but see *Rex* v. *Harris*, 2 Leach, C.L. 929, *infra*, note (*c*).

(*z*) See Forms, 8 Wentw. Index, XXIV.; *Bentley* v. *Donnelly*, 8 T. R. 127; Com. Dig. Rescous, D. 2; Bac. Ab. Rescue; *Kent* v. *Lewis*, Cro. Jac. 242; *Hodges* v. *Marks*, Id. 485; 2 Saund. 305, b.; *Brasier* v. *Jones*, 8 Bar. & C. 124; *Nightingale* v. *Wilcoxon*, 10 Bar. & C. 202.

(*a*) 1 Saund. 37; *Fox* v. *Jones*, 7 Bar. & C. 80; *Brasier* v. *Jones*, 8 Bar. & C. 129; Bul. N. P. 65; *Weaver* v. *Clifford*, Cro. Jac. 3; *Burton* v. *Eyre*, Id. 288.

(*b*) *Rex* v. *Nestor*, Hertford Assizes, Best, J. MS. 1 East, P. C. 321; what is an outer door, see *Hopkins* v. *Nightingale*, 1 Esp. R. 99.

(*c*) *Rex* v. *Harris*, 2 Leach, C. L. 929.

mitted; and as in the before-mentioned case of the illegal attempt to arrest by breaking open the outer door, the officer did not attempt a *felony*, the killing therefore was not justifiable, but punishable as manslaughter; although a mere battery of an officer, not using a dangerous weapon, in order to make him desist from any such illegal arrest, would be justifiable and defensible. (c) The same rule applies to criminal proceedings; but as the general and particular powers to apprehend without formal warrant, given by various statutes to officers of the customs and excise, (d) and to other officers arresting for felony, or suspicion of felony, (e) and under the vagrant act, and other acts against larceny and malicious injuries even to private persons, (f) are now so extensive, it very seldom occurs that any one can safely resist an apprehension, but should merely protest, and afterwards contest the legality of the imprisonment before the magistrate, or by writ of *habeas corpus*, or find bail, as in general the only safe course.

Of the necessity for submitting to *lawful* imprisonment, without inquiring into existence of debt, or truth of the charge.

But in all these cases, whether of arrest for a supposed debt, or apprehension for a supposed crime, it is a general rule that the *falsity of the charge*, that is, the real injustice of the demand in the one case, or the party's innocence in the other, will afford no excuse for resisting the process, or the officer employed in enforcing it, when specific and express to take a particular party; and resistance, escape, or rescue, is only justified or excused where the process itself, or the conduct of the officer, is illegal, admitting the existence of the debt, or the guilt of the crime; for every man is ***bound to submit himself to the regular course of justice***, and should wait the ***ultimate decision*** on the claim or the imputed crime. And therefore, although there be no debt, nor any just pretence for obtaining the warrant, yet if the process in itself be formal and sufficient, then resistance would be illegal, and if the resistance should occasion the death of the officer, it will be *murder*. And even a battery, or mere resistance of the officer, are in general punishable, as well at common law, (g) as under the provisions of various acts of parliament now extending to almost every case that can arise. (h) Thus, where a serjeant at mace had falsely sworn

(c) *Rex* v. *Harris*, 2 Leach, C. L. 929.
(d) 6 Geo. 4, c. 108, Customs; 7 & 8 Geo. 4, c. 53, Excise.
(e) 1 & 2 Geo. 4, c. 88, s. 1 & 2.
(f) 7 & 8 Geo. 4, c. 29, s. 63, larceny and petty thefts; 7 & 8 Geo. 4, c. 30, s. 28, wilful or malicious injuries to personal or real property; 1 & 2 Wm. 4, c. 32, game act; and various other statutes; *ante*, 620 to 627.
(g) 1 East, P. C. 309, 310; Id. 299, 300; 2 Inst. 590; Foster's Cr. C. 135; 1 Hale, 610.
(h) See several acts, *ante*, 620 to 627.

before a justice that he had been authorized by process to arrest Dixon, when his name was not in such process, and that Dixon had rescued himself, and thereby induced the justice to grant *an escape warrant* against Dixon, and the latter killed the officer in attempting to apprehend him, this was holden murder, because the escape warrant was in itself valid and sufficient, though it had been obtained by false swearing to the rescue. (*i*) So if a person be imprisoned by *lawful* warrant for a supposed felony, if he break prison he is equally guilty of the offence of prison breaking, whether or not a felony had been committed. (*k*)

The imprudence of resistance.

Upon the whole, it appears to be very hazardous to resist the execution of any process or arrest having the least semblance of a legal proceeding, as the powers to *arrest* in *civil* cases and to *apprehend* in *criminal* are most extensive; and it is in general merely an accidental and subsequent discovery of the defect in the proceeding turning up in favour of the party resisting, than any certain ground upon which he should in prudence act; and as relief from the illegal imprisonment may in general be speedily obtained by *habeas corpus*, or by motion to the court, and afterwards compensated by action for false imprisonment, in which full costs are recoverable, the wisest course is not only to protest against, but to submit for the time to the illegal imprisonment, rather than by hazarding a resistance being subjected to the serious consequences that sometimes ensue.

This inconvenience may, however, result from submitting to an unlawful arrest under illegal process, namely, that *third* persons may, pending the imprisonment under it, lodge detainers, from which the party arrested would not be discharged; but if the original process be afterwards set aside, the party imprisoned would be discharged from all other imprisonment at the suit of the *same* plaintiff, or in collusion with him or his attorney. (*l*) But in a late case, where a party, against whom a true bill for perjury had been found in England, was illegally apprehended abroad at the instance of the prosecutor, upon the chief justice's warrant, which did not extend to a foreign country, and was brought over here in custody, and committed to prison for want of bail, the court refused to

(*i*) Foster's Cr. L. 135.
(*k*) 2 Inst. 590; 1 Hale, 610.
(*l*) *Barclay* v. *Faber*, 2 Bar. & Ald. 743; 1 Chit. R. 579, 580, S. C.; *Wells* v. *Gurney*, 8 Bar. & Cres. 769; Tidd, 9th ed. 210; Id. Supplement, 75.

discharge her, on the ground that she had been improperly apprehended in a foreign country, as the prosecution was on the part of the king, and not like a civil suit, for the benefit of the prosecution. (m)

VI. Of recaption of a relative, or of personal or real property.

VI. Having thus considered the *resistance* and *preventions* of injuries, and when illegal process may be resisted, we will proceed to the consideration of the *Rights of Recaption.* This occurs when a husband, parent, or master, has been illegally deprived of the custody of his wife, child, or apprentice or servant, or the owner of his personal or real property. And in each case the law, under circumstances, allows the recaption of the person of the relative, and of the property, where either may happen to be, provided he can do so without occasioning a breach of the peace, or an injury to a third person who has not been party to the injury. (n) The *principle* upon which such recaption is allowed is, that it might frequently happen, if that right were not allowed by law, that the owner would have that only opportunity of doing himself justice, for his relative might otherwise be concealed or removed from the kingdom, or his goods might be conveyed away or destroyed, or his lands wasted, if he were not allowed a speedier remedy than the ordinary process of law affords. (o) If, therefore, he can contrive to regain possession of his relative or property without undue force, the law favours and will justify his proceeding. But as the public peace is a superior consideration to the private rights of any individual, and as, if individuals were allowed to use their own force as a remedy for private injuries, all social justice would cease, and the strong would prescribe law to the weak, and every man would revert to a state of nature, therefore the law declares that this natural right of recaption shall never be exerted when it would probably occasion strife or bodily contention, and endanger the peace of society. If, for instance, an horse be taken away, and it be found by the owner upon a common, or in a fair, or in a public inn, he may lawfully seize him; but he could not legally break open a private stable, or enter the grounds of a *third* person to take him, unless where he has been feloniously stolen, but must have recourse to an action at law. (p) Many

(m) *Ex parte Scott*, 9 Bar. & Cr. 446; Parke, J. dissentiente.

(n) 3 Inst. 134; Hal. Anal. p. 46.

(o) *Per* Littledale, J. in *Cubitt* v. *Porter*, 8 Bar. & Cres. 269.

(p) *Higgins* v. *Andrewes*, 2 Roll. Rep. 55, 56; *Masters and Poole's Case*, Id. 208; 2 Roll. Abr. 565, 566; 3 Bla. Com. 5; and *per* Tindal, C. J. in *Rich* v. *Woolley*, 7 Bing. 661, *post*.

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of the cases connected with this right have already been considered when examining the *resistance* of injuries, but some remain, and require to be noticed more distinctly under this separate head.

1. Recaption of the person of a relative.

1. When a wife, a child, or an apprentice, or, according to Blackstone, a servant, (but that must be limited to a servant who *assents* to the recaption), (*q*) has been taken away wrongfully by the party withholding either, the person entitled to the custody may at once, and without any formal request or demand, peaceably enter the house of the wrong-doer, the outer door being open, and carry away the party wrongfully detained. (*r*) But where the party harbouring was not concerned in the original abduction, then it should seem that there should be a demand and refusal before an entry into the house of the wrong-doer can be legally made, and in a plea justifying the immediate entry, the facts rendering it legal must be specially stated. (*s*) But in neither case can the recaption be legally effected in a riotous manner, or attended with a breach of the peace; (*t*) but though, if a forcible entry be made, the party might be indicted for such breach of the peace, yet unless some actual injury were committed to the person or property of the original wrong-doer, he could not sustain any civil action in respect of the forcible manner of regaining the wife, child, or apprentice. If the recaption be resisted with force, then recourse must be had to a court or judge for an *habeas corpus* on behalf of the husband, (*u*) parent, or guardian, (*x*) or on behalf of the apprentice, (*y*) or for the chief justice's warrant; (*z*) or recourse may be had to a court of equity to compel the return of a child or ward to his studies, or to an appointed place. (*a*) And if a wife elope with an adulterer or another, the husband may legally with force retake her; and if they escape to France, their separation may by the local law be enforced, and the adulterer imprisoned for a year. (*b*)

With respect to an *apprentice or servant*, it is said that if he depart out of his master's service and the master happen after-

(*q*) *Post*, 641, (*c*); Dalt. J. c. 121.

(*r*) 3 Inst. 134; Hal. Anal. p. 46; 3 Bla. Com. 4.

(*s*) *Semble*, *Anthony* v. *Haneys*, 8 Bing. 186.

(*t*) 3 Bla. Com. 4, and reasons, *Rich* v. *Woolley*, 7 Bing. 661, 662.

(*u*) *Rex* v. *Doherty*, 13 East, 173; *Rex* v. *Middleton*, 1 Chit. R. 654.

(*x*) *In re Pearson*, 4 Moore, 366; *Rex* v. *Hopkins*, 7 East, 579.

(*y*) *Ex parte Landsdown*, 5 East, 38, only on application of apprentice.

(*z*) *Rex* v. *Edwards*, 7 T. R. 745.

(*a*) *Duke of Beaufort* v. *Berty*, 1 P. Wms. 702; *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 117; *Ex parte Warner*, 4 Bro. C. C. 101; 2 Forst. 5th ed. 232; *Tremaine's Case*, 1 Stra. 167; *Hall* v. *Hall*, 3 Atk. 721; *Storke* v. *Storke*, 3 P. Wms. 51.

(*b*) Code.

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wards to lay hold of him, yet the master may not beat or *forcibly compel* him against his will to return or tarry with him, or do his service, but either he must complain to the justices of the departure, or he may have an action of covenant against the third person, who covenanted for his faithful services. (*c*) But this does not apply to menial servants, over whom magistrates have no controul.

2. Recaption of personal property.

2. The same principles extend to the Recaption of *Personal Property,* (*d*) and it has been observed, that there may be many cases where recaption may be *the only* or the best remedy; as if one joint-tenant or tenant in common take a chattel real or personal, and assume the exclusive possession, in which case his co-tenant cannot support an action against him, (although sometimes a Court of Equity would regulate the enjoyment,) and therefore the only remedy would be for the other co-owner to retake the possession. (*e*)

If a party be wrongfully dispossessed of his personal property, he may in general justify the retaking them from the house and custody of the *wrong-doer,* even without a previous request to redeliver them; for the violence which happens through the resistance of the wrongful taker being attributable to his own original tortious act, deprives him of any right to complain. (*f*) But in this recaption, care must be observed to avoid any personal injury, or any forcible entry or breach of the peace, and if either be anticipated, then the owner of the goods should replevy or resort to an action rather than subject himself to a proceeding for the personal injury, or an indictment for the breach of the peace. (*g*)

If the personal property was not originally illegaly seized, but is merely wrongfully detained, then the owner must first request the re-delivery, and he cannot justify more than gently laying his hands on the wrong-doer in order to recover it; (*h*) nor can the owner, without leave, enter the door of the house of *a third person* not privy to the wrongful detainer, to take the goods

(*c*) Dalt. J., c. 121, page 281, 282; Burn's J. Apprentice, VI. (*b*); and see *Rex* v. *Reynolds,* 6 T. R. 497; *Rex* v. *Edwards,* 7 T. R. 745; *Ex parte Landsdown,* 5 East, 38, the reason why the Court refuse an habeas corpus in case an apprentice is willing to serve in the navy.

(*d*) *Ante,* 639, 634.

(*e*) *Per* Littledale, J. in *Cubitt* v. *Porter,* 8 Bar. & Cres. 269.

(*f*) *Anon.* 3 Salk. 169; 3 Bla. C. 404, 405, note 12; *Weaver* v. *Bush,* 8 T. R. 78; *Higgins* v. *Andrewes,* 2 Rol. R. 56; *Masters and Poolie's case,* Id. 208; Rol. Ab. 565, pl. 50; *Anon.* 2 Leo. 202; Selwyn, N. P. tit. Assault and Battery.

(*g*) *Rex* v. *Wilson and others,* 8 T. R. 364; *Weaver* v. *Bush,* 8 T. R. 78; *Gregory* v. *Hill,* Id. 299; 1 Saund. 296.

(*h*) *Weaver* v. *Bush,* 8 T. R. 78; *Higgins* v. *Andrewes,* 2 Rol. R. 56; *Masters and Poolie's case,* Id. 208; Rol. Ab. 565, pl. 50; *Anon.* 2 Leo. 202; Selwyn, N. P. tit. Assault and Battery.

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therefrom; (i) and the same doctrine extends to the *land* of a third person; (k) and therefore a plea to a declaration in trespass for entering a close, that certain goods of the defendant *were there*, (without showing how) and that they entered to take them, doing no unnecessary damage, was holden ill, as it neither stated how the goods came there, as by the tortious act of the plaintiff, or by his license, or by accident, nor showed any previous request to have the goods delivered; (l) and there should have been at least a *prior request*, and even then and after it a party cannot in all cases legally enter the house or land of another to retake his property, but must frequently proceed by action of detinue, replevin, or *trover*; (m) and in no case can the owner be guilty of riot, or a forcible entry, or breach of the peace to regain his property, (n) or if he be, he may be indicted for a breach of the peace.

Another general rule is, that the natural right of recaption should never be exerted where such exertion would occasion strife and bodily contention, or endanger the peace of society. Therefore we have seen, that if an horse is taken away and the owner find him in a common, a fair, or a public inn, he may lawfully seize him for his own use; but that he could not justify breaking open a private stable, or entering on the grounds of a third person to take him, but should have recourse to an action at law. (o) So, in justifying the breaking open a lock to distrain cattle frudulently removed, under 11 Geo. 2, c. 19, it must be averred and proved that a peace officer was present; and in a plea of recaption upon a rescue, it must be averred that the recaption was in fresh pursuit. (p)

If a party take my personal property and alter its form, or improve it without altering it into a *different species*, I may retake the whole. (q) In case of goods obtained by *false and fraudulent pretences* of a *purchase*, no property passes, and the vendor may lawfully rescue or retake them even out of the hands of the sheriff, who had taken them under an execution against the wrong-doer, and this even by stratagem. (r)

But if a tenant neglect to remove his *fixtures* or *crops* during his tenancy, he loses his property therein, unless in cases where he is entitled to emblements or a way-going crop,

(i) *Higgins* v. *Andrewes* 2 Rol. Rep. 55, 56; *Masters and Poolie's case*, Id. 208; 2 Rol Ab. 565, I. pl. 2 Bac. Ab. Trespass, E.

(k) *Anthony* v. *Haney*, 8 Bing. 186.

(l) Id. ibid.

(m) *Ante*, 641, n. (g); *Anthony* v. *Haney*, 8 Bing. 186.

(n) 3 Bla. C. 4; *Rich* v. *Woolley*, 7 Bing. 661, 662.

(o) Per Tindal, C. J. *Rich* v. *Woolley*, 7 Bing. 661, citing 2 Rol. Ab. 565; 3 Bla. C. 5; *ante*, 639.

(p) *Rich* v. *Woolley*, 7 Bing. 651.

(q) 3 Bla. C. 404, 405, note 12.

(r) *Earl of Bristol* v. *Willsmore*, 1 Bar. & C. 514; 2 D. & R. 755, S.C; *Noble* v. *Adams*, 7 Taunt. 59.

and he cannot afterwards enter to re-take them, or support an action of trover for withholding them; (s) and if a vendor execute a general conveyance of land, and neglect previously to remove his fixtures, they pass by the conveyance, and it is too late to enter and retake them. (t) But where an occupier has been strictly a tenant at will, or at sufferance, and another person has determined his right to continue in possession, it should seem that he would not be a trespasser if he enter afterwards to remove his goods, and continue only a reasonable time for that purpose. (u)

We have seen what degree of force may be used in *defence of personal* property, and the same rules will here apply. (x) If, upon an officer's showing a search warrant to the occupier of an house the latter refuse to return it, the officer will be justified in using just so much violence as may be necessary to retake it, and no more, and it will be a question for a jury whether the officer used more force than was necessary, for if he did, then such excess of force might be legally repelled. (y) The rule is, that to justify an entry into the house or land of another to retake personal property, it must be shown that it was improperly taken away, or received, or detained, and placed by the wrong-doer in his house, or land, in which case an entry may be made without previous request, or an instant seizure; (z) but in other cases, in order to retake, the owner can only justify *moliter manus*, (a) nor can he, without leave, enter the house of a third person, not privy to the wrongful detainer, to take his goods therefrom, if they get there through his own default. (b) An executor or administrator may enter the house or land of the heir, to remove the personal estate of the deceased, after demand, and ought to remove the same within a reasonable time, or the same may be distrained damage feasant. (c)

If trees be blown down, it is not trespass for the owner to enter the land into which they fall to take them, (d) so if a man have to lop his tree, and he cannot do it unless it fall, without

(s) *Doe dem. Nicholl* v. *M'Kaeg*, 10 Bar. & Cres. 721; *Lyde* v. *Russell*, 1 Bar. & Ald. 394.

(t) *Colegrave* v. *Dios Santos*, 2 Bar. & Cres. 76.

(u) *Doe dem. Nicholl* v. *M'Kaeg*, 10 Bar. & Cres. 721.

(x) *Ante*, 597 to 599.

(y) *Rex* v. *Milton*, 1 Mood. & M. 107; 3 Car. & P. 31, S. C.

(z) *Crawford* v. *Hunter*, 8 T. R. 13; *Higgins* v. *Andrewes*, 2 Rol. R. 56; *Musters and Pool's case*, 2 Rol. 208; Rol. Ab. 565; *Anon.* 2 Leo. 202; Selw. N. P., Assault and Battery.

(a) Id. ibid.

(b) Id. ibid.; *Anthony* v. *Haney*, 8 Bing. 186.

(c) *Ante*, 512; Went. Off. Ex. 81, 202, 14 ed.; *Stodden* v. *Harvey*, Cro. J. 204; *Graysbrook* v. *Fox*, Plowd. 280; 2 Williams, 602.

(d) Vin. Ab. Trespass, H. a. 2.

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his fault, upon the land of another, he may justify the felling of it upon such last mentioned land. (e) So if a fruit tree grow in a hedge, and the fruit fall into the land of another, the owner may go upon the land and fetch it: (f) but in these cases, the occupier should be previously requested to deliver the property to the owner, or to allow him to enter. (g) And in all these cases, the special excuse for the entry on the land of another must be shown, for if the goods happen to be on the land of another, without any default on his part, it does not follow that there is any right to enter to retake them, but the owner must make a demand, and then proceed by action, when sustainable; and therefore a plea to a declaration in trespass for entering land, merely stating that the defendant's goods *were there*, and that he therefore entered to carry them away, was holden bad, as well for not showing any previous request as also for not stating the special circumstances how the goods came there, and that the defendant had any right of entry. (h)

If goods be illegally taken or distrained under colour of a distress or seizure without warrant, then, at any time before they have been impounded, the owner may make a rescue, but if they be impounded, then it is said that the owner cannot justify the breach of the pound to take them out, because the distress is then in the custody of the law, and the proper course is to replevy or sue for the wrongful seizure: but if the pound be unlocked, it seems the owner may, in such case of illegal seizure, take them. (i) But it should seem, that if the distress were illegal the distrainer could not maintain any action for the pound-breach, and it seems not quite settled, that a pound-breach, without conspiracy, riot, or breach of the peace, is an indictable offence. (k) In case of rescue (l) or pound-breach of a distress for *rent*, the *party grieved* may, in a special action on the case, recover treble damages and treble costs against the offenders, or against the owner of the goods, if they came to his use. (m) But as only the party grieved can sue, it should

(e) *Dyke* v. *Dunstan*, 6 Ed. 4, 18.

(f) Vin. Ab. Trespass, L. a. *post*, 653.

(g) See *ante*, 569, and form.

(h) *Anthony* v. *Haney*, 8 Bing. 186.

(i) *Knowles* v. *Blake*, 3 Moore & P. 214; 5 Bing. 499, S. C.; Bul. N. P. 61. N.B. The facts in the case of *Knowles* v. *Blake* have been misrepresented. I was in the cause, and the cattle were impounded in a *public pound*, which the defendant Blake broke open, and took the cattle therefrom. The report of the learned judge who tried the cause completely misapprehended the facts.

(k) As to pound-breach being indictable, see *Sanderson's case*, 4 Leon. 12; Gilb. 75; Com. Dig. Rescous, D. 3; 2 Hawk. c. 10, s. 56; 1 Russ. Crim. L. 363; Cro. Cir. Assist. 9 ed.; 2 Chit. Crim. L. 204; but see Burn's J. Distress, 1001, and form 17.

(l) What a rescue of goods, *Knowles* v. *Blake*, 5 Bing. 499.

(m) 2 W. & M. sess. 1, c. 5, s. 4; *Firth* v. *Purvis*, 5 T. R. 432; *Lawson* v. *Storey*, 1 Lord Raym. 20.

seem that if the distress was illegal the wrongful distrainor could not sue, and that consequently, at least, a rescue may be made when the distress was illegal, and it is usual, in a declaration upon this statute, to show the right to distrain,(n) though it is otherwise in a declaration for a pound-breach of goods taken damage feasant.(o)

With respect to goods wrongfully obtained under colour of a *contract*, if the pretended purchaser's conduct was so fraudulent as to avoid the contract, the *vendor* may retake or even rescue them by any stratagem, even when taken and in the hands of the sheriff under an execution at the suit of a creditor against the fraudulent purchaser.(p)

So where goods have been purchased without such fraud, and it be discovered, before they have reached their destination or in the hands of the purchaser, that he is insolvent, they may be stopped *in transitu* by any means short of force,(q) though a part delivery will in general defeat the right to stop the residue.(r) When a person can legally stop goods *in transitu*, he should *himself* immediately exercise that power to avoid loss, for a Court of Equity it seems will not lend its aid for the purpose.(s) The right to stop *in transitu* is one of the most important branches of law.

Between tenants in common and joint-tenants of personal as well as real property there are cases of injuries where the only remedy is to retake the property.(t)

On the other hand, the *purchaser* of a specific chattel, who has paid for the same, or who tenders the price, may take them with force, in case the vendor or a third person should refuse to deliver them; but in general, by a contract to sell or to make and deliver an article, which the vendor might satisfy by delivering any article of the same description and value, no property passes in any specific article until actually set apart or marked, and consequently the purchaser, although he may have

(n) *Ridley* v. *Bell*, Lutw. 218; *Bellasyse* v. *Burbridge*, 3 Ld. Raym. 177; Mod. Ent. 210; Bul. N.P. 61; *Bentley* v. *Donelly*, 8 T. R. 130; Com. Dig. Pleader, C. 19.

(o) *Cotsworth* v. *Betison*, 1 Ld. Raym. 104; 1 Salk. 247, S. C.

(p) *Noble* v. *Adams*, 7 Taunt. 59; *Earl of Bristol* v. *Wilsmore*, 1 B. & Cres. 514; *Ferguson* v. *Carrington*, 9 B. & Cres. 59; *Stephenson* v. *Hart*, 4 Bing. 476, [illegible].

(q) *Lickbarrow* v. *Mason*, 2 T. R. 75; *In re the Constantia*, 6 Robinson, Rep. 324; *Hawes* v. *Watson*, 2 B. & C. 546.

(r) *Scott* v. *Goodwin*, 1 New R. 69; *Sluby* v. *Heyward*, 2 Hen. Bla. 504; *Hartey* v. *Cook*, 6 East, 227; *Crayshaw* v. *Eades*, 1 B. & C. 181.

(s) *Goodhurst* v. *Lowe*, 2 Jac. & W. 349.

(t) Per Littledale, J. 8 Bar. & Cres. 268; *Heath* v. *Hubbard*, 4 East, 117, 121; Co. Lit. 200, a.; *Martyn* v. *Knowles*, 8 T. R. 145; 2 Saund. 47, [illegible]; 1 Chit. Pl. 5th ed. 91.

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paid the full price, cannot take the article though making for him, or any one of like value. (u)

3. Reception or re-entry with force on *Real Property*.

3. It is laid down at the common law, "that if a man be disseised of any lands or tenements, he may, if he cannot prevail by fair means, legally regain the possession thereof by *force*, unless he were put to the necessity of bringing his action by having neglected to re-enter in due time, i. e. within 20 years, for the violence which happens through the resistance of the wrongful possession, being originally owing to the wrong-doer's own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought." (x) And although Lord Kenyon has observed upon that doctrine, and it seems clear, that if on regaining possession to which a party is entitled, he be guilty of a forcible entry or breach of the peace, he may be *indicted* for the disturbance of the peace; (y) yet it is equally clear that the original wrong-doer, or person who had no right to retain the possession, could not sustain any *action* for such forcible regaining possession, as far as regards any alleged injury to the house or land, or the expulsion, but at most only for any unnecessary personal injury in turning him out, or avoidable damage to furniture. (z) So that actions of ejectment are very frequently unnecessarily resorted to. (z) The better way however is in these cases to avoid personal violence or the breaking an outer door, and to obtain possession through the intervention of a tax gatherer (who may be authorized by a warrant to break open doors) or by stratagem. In general, when the occupier wrongfully holds over, after his tenancy has expired, the landlord may enter peaceably and turn on his cattle; and if the occupier should wrongfully distrain, then the landlord may support replevy or sustain an action of trover or trespass; (a) and in the absence of the occupier he may break open the outer door of a house and take possession, although goods of the late

(u) *Mucklow* v. *Mangles*, 1 Taunt. 320; *White* v. *Wilks*, 5 Taunt. 176; *Shepley* v. *Davis*, Id. 617; *Busk* v. *Davis*, 2 Maule & Sel. 397; *Zagury* v. *Furnell*, 2 Campb. 240; *Wood* v. *Russell*, 5 Bar. & Ald. 942.

(x) Hawk. c. 64, s. 1; 3 Salk. 169.

(y) *Rex* v. *Wilson and others*, 8 T. R. 364.

(z) *Taunton* v. *Costar*, 7 T. R. 431; *Rex* v. *Wilson and others*, 8 T. R. 364; *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574, S. C.; *Wildbor* v. *Rainsforth*, 8 B. & C. 4; *Davis* v. *Connop*, 1 Price, 53; *Rogers* v. *Pitcher*, 6 Taunt. 202; 1 Saund. 296, a. 1. If the party thus ousted should bring trespass for the eviction, and even pulling down the house, the plea of *liberum tenementum* would be an answer, and the plaintiff could not reply excessive violence as regards the land or building, for the defendant had a right even to pull down his own house, and if the plaintiff should reply his former tenancy, the defendant would rejoin showing how it was determined, which would if true be a conclusive bar to the action.

(a) *Taunton* v. *Costar*, 7 T. R. 431.

tenant remain there.(*b*) So the landlord is entitled to and may seize the growing crops as his own, unless they are strictly emblements, or were sown under a custom to have an away-going-crop.(*c*) And a mortgagee may thus take possession from the mortgagor, or any person who became tenant after the mortgage, and who has not been acknowledged by him.(*d*) And a person who has recovered in ejectment may, without any writ, thus take possession.(*e*)

VII. Of the removal of injuries by abating, &c.

First, Private nuisance.

1. Nuisances or injuries to the *person.*

VII. Cases of abatement or removal of injuries by the mere act of the party himself, and without the assistance of the law, generally occur in private or public *nuisances* as they are usually termed. But the same principles will, in general, apply to other cases. Thus it should seem that in the case of a clear libel upon the character of a party, published as a gross caricature, rendering him ridiculous, and subjecting the wrong-doer to an indictment, the party injured might destroy it; (*f*) it is true that in a late case the owner of such a picture, intrinsically worth several hundred pounds, recovered 5*l.* damages for

(*b*) *Turner* v. *Meymott*, 7 Moore, R. 574; 1 Bing. 158, S. C.; *Butcher* v. *Butcher*, 1 Man. & R. 220. Where the tenant of a house, after a regular notice to quit, abandoned the premises, locked up the door, and left only a few articles of furniture therein, and the landlord afterwards, in his absence, and when no person was in the house, broke open the door and took possession, held that he was justified in so doing, as he had a legal right of entry, and it seems that the tenant cannot maintain trespass against him, but that his remedy, if any, is by indictment for forcible entry.

Lord C. J. Dallas.—"The plaintiff as tenant held over after a regular notice to quit. His legal right of possession was then determined and vested in the landlord, and it must be admitted that the latter had a right to take possession in some way or other. In *Taunton* v. *Costar*, 7 T. R. 431, Lord Kenyon said that, "if indeed the landlord had entered with a strong hand to dispossess the tenant by force, he might be indicted for a forcible entry; but that there could be no doubt of his right to enter upon the land at the expiration of the term;" and in *Taylor* v. *Cole*, 3 T. R. 295, his lordship further observed that, "a person having a right of entry might enter peaceably, and being in possession might retain it." In the former case, the putting in the cattle was an act of possession to which the landlord was deemed to be entitled. I take it to be clear that on the determination of a tenancy a landlord is *entitled to take possession peaceably. The only question* then is, as to the distinction between a *peaceable* and *forcible* entry. The latter is an act against the public, which subjects the party to an indictment, but surely it is a different case where a tenant holds over against law and justice. Here the plaintiff had ceased to be tenant to the defendant, and it would be going a great length to say, that he could bring an action of trespass against him for entering his own house. If the plaintiff has any remedy he may try it by an indictment for a forcible entry."

(*c*) *Davis* v. *Connop*, 1 Price, R. 55; *Doe* d. *Upton* v. *Witherwich*, 3 Bing. 11.

(*d*) *Doe* d. *Roby* v. *Maisey*, 8 Bar. & C. 767, and 5 Bing. 421, S. C. *ante*, 258.

(*e*) *Taylor* v. *Horde*, 1 Burr. 60, 88; *Badger* v. *Floid*, 12 Mod. 398; *Withers* v. *Harris*, 2 Lord Raym. 806, 808.

(*f*) As to the power of seizing blasphemous or seditious libels, see 60 Geo. 3, and 1 Geo. 4, c. 8.

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destroying the same, but the defendant had unadvisedly pleaded only the general issue, and it may be collected that if he had pleaded a justification, he would have sustained a defence; (*g*) and the old law clearly was, that an infamous libel might be destroyed by any one, though it has been stated to be the safer course to take the libel to a magistrate, who might direct what proceedings should be pursued; (*h*) and who might issue a warrant for publishing the libel, at least when reflecting upon a judge. (*i*)

2 & 3. Abatements and removals of private nuisances and injuries to *personal* or *real property*.

2, 3. The reason why the law allows the *abatement of a nuisance*, private or public, by any individual annoyed by it, (a private and summary method of doing oneself justice,) is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an *immediate* remedy and cannot wait for the slow progress of the ordinary forms of justice. (*k*) But at least in the case of a private nuisance, the building or act, however *likely* to become a nuisance, cannot be legally abated until it has actually become so in *some sen-*

(*g*) *Ante*, 44; and see stat. 60 Geo. 3, and 1 Geo. 4, c. 8, as to the seizure of blasphemous or seditious libels; and see *Earl Lonsdale* v. *Nelson*, 2 Bar. & Cress. 311, *Du Bost* v. *Beresford*, 2 Campb. 511, was as follows: Trespass for cutting and destroying a picture which the plaintiff had publicly exhibited; *per quod*, loss of picture and profits from exhibiting the same. Plea, *not guilty*. It appeared that the plaintiff was an artist of considerable eminence, but that the picture in question, called "La Belle et la Bête," or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited at a house in Pall Mall for money, and great crowds went daily to see it until the defendant cut it in pieces. Some of the witnesses estimated it at several hundred guineas. The plaintiff's counsel insisted, on the one hand, that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition; while it was contended on the other, that the exhibition was a public nuisance, which every one had a right to abate by destroying the picture.

Lord Ellenborough.—The only plea upon the record being the general issue of not guilty, it is unnecessary to consider whether the destruction of this picture might or might not have been justified. The material question is, as to the *value* to be set upon the article destroyed. If it was a libel on the persons introduced into it, the law cannot consider it *valuable* as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvass and paint which formed its component parts.—Verdict for 5*l*. damages.—But the supposition of Lord Ellenborough's, that the Chancellor would have interfered, has been treated as erroneous. See *Gee* v. *Pritchard*, 2 Swanst. 402, *post*, next chapter.

(*h*) *Anon.* 5 Coke's Rep. 125, b.; *Lake* v. *Hatton*, Hob. 253; see *Du Bost* v. *Beresford*, 2 Campb. 511. The court, after commenting strongly on the provoking tendency of libels, observed—

"And it was resolved in *Halliwood's case*, M. 43 & 44 Eliz. that if one find a libel, (and would keep himself out of danger,) *if it be composed against a private man, the finder either may burn it* or presently deliver it to a magistrate; but if it concern a magistrate or other public person the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished."

(*i*) *Butt* v. *Conant*, 1 Brod. & B. 548; 6 Moore, 65, S. C.; 3 Brod. & B. 3; Gow, C. N. P. 84, S. C.

(*k*) 3 Bla. C. 6; *Earl Lonsdale* v. *Nelson*, 2 Bar. & C. 302; 3 Dowl. & R. 556, S. C. The instance of destroying a libellous caricature may be considered as of the same nature, *supra*, n. (*g*), (*h*).

sible degree, and not prospectively or *quia timet*. (*l*) And before an actual injury has arisen, the party apprehending prospective injury should file a bill in equity for an injunction. (*m*) If a wrong-doer illegally erect upon his own soil a thing which is a nuisance to another, as by stopping a *rivulet* and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance and justify the trespass, and this right of abatement is not confined merely to nuisances to a *house*, to a *mill*, or to *land*. (*n*) So if a person on his own land erect a building which obstructs the light or air passing through an ancient window, the occupier of the latter may legally abate or remove it, and if necessary may enter the premises of the wrong-doer for that purpose. (*o*) On the other hand, although a person may have a right for light and air to pass through his ancient window into his building, yet the occupier of the adjoining land might prevent such party from overlooking his premises by so placing boards or other obstructions *under the window* as to prevent such overlooking, but taking care not to commit any trespass upon or to the building in which the window is placed. (*p*)

When the nuisance was occasioned by the *tortious misfeazance* or *malfeazance* of another, the party thereby injured may in general abate the nuisance immediately and without any previous notice or request; but if the nuisance be merely continued by a party who did not erect it, or when it consists of *omission*, the party should be requested to remove it before the party injured can himself remove the injury; (*q*) for nuisances by an act of *commission* are committed in defiance of those whom such nuisances injure, and the injured party may *abate them* without *notice* to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from *omission*, except that of cutting branches of trees which overhang a public road or the private

(*l*) *Rex* v. *Wharton and others*, 12 Mod. 510; but see *Greenslade* v. *Halliday*, 6 Bing. 381, 382, where no objection was made to a removal in *anticipation* of injury, and so as to prevent the other party's assertion of a larger right than he was entitled to.

(*m*) See *post*, ch. viii.

(*n*) *Raikes* v. *Townsend and another*, 2 Smith's R. 9; Com. Dig. tit. Plead. 3, M. 38, 41. The cases put in 2 Rol. Ab. 144, b, Nuisance, Reformation, (S), are only put by way of instance.

(*o*) *Penwarden* v. *Ching*, 1 Mood. & M. 400; though we have seen that if he should throw water over the party erecting the obstruction, he would by such excess become a trespasser, *ante*, 600, note (*p*).

(*p*) What is such a contact as to constitute a trespass to a building or fence, see *Arlett* v. *Ellis*, 9 Bar. & Cress. 691, *ante*, 380.

(*q*) *The Earl Lonsdale* v. *Nelson*, 2 Bar. & C. 302; 3 Dowl. & R. 556, S. C.; *post*, 650, note (*r*), and as to destroying a libellous picture, *Du Bost* v. *Beresford*, 2 Campb. 511, *ante*, 648, note (*g*), and as to seizing blasphemous or seditious libels, 60 Geo. 3, & 1 Geo. 4, c. 8.

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property of the person who cuts them; the permitting these branches to extend beyond the soil of the owner of the trees is a most unequivocal act of negligence which distinguishes that case from most of the others that have occurred; the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy; in such cases an individual would be justified in abating a nuisance from omission *without previous notice;* but in all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a court of justice. (*r*)

In abating a *private* nuisance care must be observed to abate no more than is necessary to restore the party injured to the enjoyment of his right as before the nuisance; thus if a house be built too high, only so much of it as exceeds the lawful height should be pulled down; (*s*) and supposing that a person might legally remove stakes which had been placed in a water-course so as to occasion a permanent instead of an occasional irrigation of the party's meadow, if another party remove a board as well as the stakes, he will be liable to be sued for the excess in removal; (*t*) and no unnecessary cutting or injury must be committed; (*u*) and if it be necessary to remove materials, they must be removed only to a small distance, (*x*) and placed where the same will not probably be injured, as on his own premises, for otherwise the party removing will become a trespasser *ab initio* or guilty of a conversion, (*y*) or at least will be liable to make compensation for so much of his conduct as was illegal; (*z*) there-

(*r*) *Per* Best, J. in *The Earl of Lonsdale* v. *Nelson*, 2 Bar. & Cres. 302; 3 D. & R. 556, S. C. Even in cases of public nuisance the Highway Act requires notice to the occupier before a nuisance can be removed. Therefore when in trespass for entering the plaintiff's manor, &c. the defendant pleaded that there was a Public Port partly within the said manor, and also in a river which had been a public navigable river, and that there is in that part of the port which is within the manor *an ancient* work necessary for the preservation of the port and for the safety and convenience of the ships resorting to it, and that such work was in decay, and that the plaintiff *would not repair it but neglected so to do*, and therefore the defendants entered and repaired; and upon a replication *de injuria*, there was a verdict for the plaintiff on the plea of general issue, and for the defendants on the second plea; it was held that plaintiff was entitled to judgment *non obstante veredicto*, as the second plea did not state that *immediat* repairs were necessary, or that any one bound to do so had neglected to repair *after notice*, or that a reasonable time for repairing had elapsed, or that defendants had occasion to use the port.

(*s*) *Batten's case*, 9 Coke, 53; *Traherne's case*, Godb. 221; *Rex* v. *Pappineau*, 2 Stra. 686.

(*t*) *Greenslade* v. *Halliday*, 6 Bing. 379.

(*u*) *Pickering* v. *Rudd*, 1 Stark. R. 56; *Houghton* v. *Butler*, 4 T. R. 364.

(*x*) *Forsdick* v. *Collins*, 1 Stark. R. 173.

(*y*) *Houghton* v. *Butler*, 4 Term R. 364.

(*z*) *Forsdick* v. *Collins*, 1 Stark. R. 173.

fore it was held that a person who comes into possession of land on which he finds a block of stone belonging to another, is not justified in removing it to a distance, and that such removal supersedes the necessity of proving a formal demand in an action of trover; and it having been contended by counsel that the defendant had a right to remove it from his own premises, Lord Ellenborough said, "but he is not justified in removing it to a distance, for in an action of trespass at the suit of the owner, he must, in his justification, have alleged that he removed it to some adjacent place for the use of the owner, and he could not have justified this removal."(*a*) In these cases it should seem at least prudent to give the owner of the materials notice of the abatement of the nuisance and of the place to which the materials have been removed, and the notice may be as subscribed.(*b*)

If, however, a waste or *common* be surrounded by a fence placed *upon* the same, so that a person who has right of common cannot turn on his cattle, he may justify prostrating the fence and opening a way for cattle before he actually attempts to turn on, and he may prostrate a *large* piece of the fence, when so erected *upon* the common, and even much more than was necessary for the convenient ingress and egress of men and commonable cattle, because in this case the whole fence was upon the common, and injuring the pasture there,(*c*) and consequently the commoner might abate the *whole*, and not merely an opening to let in his cattle;(*d*) and it has been observed that the exercise of a right to abate may be much more convenient than that the commoner should bring an action for

(*a*) *Forsdick* v. *Collins*, 1 Stark. R. 173; *Houghton* v. *Butler*, 4 T. R. 364.

Suggested form of a notice of having removed an obstruction to an ancient window, and of the place where the materials have been deposited.

(*b*) Sir,—You having, after notice and request to you to remove the same, neglected to do so, I hereby give you notice that I have found it necessary to abate and remove so much of a certain building erected and continued by you upon the ground and premises adjoining to my messuage, situate, &c. which did unlawfully obstruct and prevent the light and air, which of right ought to have entered into and through four windows of and belonging to my said messuage, from entering the same, and thereby annoyed and incommoded myself and my family in the occupation and enjoyment of my said messuage; and inasmuch as you have refused permission to leave or deposit certain parts of the materials of your said building arising from such abatement and removal on or upon your said grounds and premises, I hereby give you notice that the said materials have been and are deposited at, &c. [*describing the place, and which should be as near as practicable,*] and that you may have and take away the same upon any reasonable application, and I request you to remove the same forthwith.

Dated, &c. Your's, &c.

(*c*) *Arlett* v. *Ellis*, 9 Bar. & C. 671; *Sadgrove* v. *Kirby*, 6 T. R, 487; *Mason* v. *Cæsar*, 2 Mood. 65; *Arlett* v. *Ellis*, 7 Bar. & C. 346; and Com. Dig. Common, II.; 3 Chit. Pl. 1110.

(*d*) *Arlett* v. *Ellis*, 7 B. & Cres. 346, 362; 9 B. & Cres. 684, S. C.

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every obstruction, because, where the fences are thrown down, the question of right may be decided in one action. (*d*) But the commoner could not have justified the prostration of *trees*, (*e*) nor killing rabbits. (*f*)

Trees, property in and cutting the same. (*g*)

With respect to the property in *trees*, and nuisances or private *injuries* arising from their boughs overhanging the land of another, much contention has arisen, and which, though provided for in the French Code, is not so well defined and regulated in this country. (*h*) The old cases establish, that if the boughs of a tree standing in a neighbour's close *grow over mine I may cut them.* (*i*) But according to the rule just stated, requiring previous request before abating a nuisance in *omission*, it should seem that there ought to be a previous request. (*k*) With respect to the property in a tree itself, it has been considered that if a tree grow in *A.*'s close, and roots in *B.*'s, yet the *body* of the main part of the tree being in the soil of *A.*, all the residue of the tree belongs to him also. (*l*) But that if it grow *in a hedge which divides* the land of *A.* and *B.*, and the roots take nourishment from both *their* lands, then they are tenants in common thereof. (*m*) But in a late case at Nisi Prius, the rule was laid down to be, that if a tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was *sown or planted.* (*m*)

(*d*) Per Littledale, J. in *Arlett* v. *Ellis*, 7 B. & Cres. 378, *ante*, 395. Besides, the right of one commoner may be disputable, whereas several commoners may concur in abating, and afterwards, in defending an action against them, all may defend either upon the right of each, or of any one the most clear.

(*e*) *Sadgrove* v. *Kirby*, 6 T. R. 487; *Arlett* v. *Ellis*, 7 B. & Cres. 362.

(*f*) 1 Saund. 353, a, n. 2, *ante*, 396.

(*g*) *Ante*, 183, 184.

(*h*) See in general Vin. Ab. tit. Trees, E. and tit. Nuisance, W. 2, and tit. Fences, and *ante*, 183, 184.

(*i*) *Norris* v. *Baker*, *per* Croke, J., 2 Rol. Rep. 394; 3 Bulstr. 198, S. C.

(*k*) *Ante*, 649, 650, but note Best, J. treated trees overgrowing a public way as an exception. See the clauses in the Highway Act, which seem to require previous notice, 13 G. 3, c. 78, s. 12, &c.

(*l*) *Masters* v. *Pollie*, 2 Roll. Rep. 141.

(*m*) *Anon.* 2 Roll. R. 255, S. P.; *Waterman* v. *Soper*, 1 Ld. Raym. 737; and *per* Littledale, J. "There is a case on the subject, (*Masters* v. *Pollie*, 2 Roll. R. 141,) in which it was considered, that if a *tree* grow in *A.*'s close, though the *roots* grow in *B.*'s, yet the *body* of the tree being in *A.*'s soil, the tree belongs to him; I remember, when I read those cases, I was of opinion that the doctrine in the case of *Masters* v. *Pollie* was preferable to that in *Waterman* v. *Soper*, (1 Ld. Raym. 737, *ante*,) and I still think so. However, if the question becomes material, I will give you leave, on the authority of that case, to move to enter a nonsuit. His lordship, in summing up to the jury, said, that with respect to any question which had been raised as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant, he did not see on what grounds the jury could find for either party; but that the safest criterion for them would be to consider whether, from the evidence given as to the situation of the *trunk* of the tree above the soil, and of the *roots* within it, they could ascertain where the tree was *first sown or planted*; if they thought it was first set in the land of the plaintiff, they would find a verdict for him, and for the defendant if the tree

But the right to cut the overhanging boughs of trees is restricted to so much only as actually overhangs the party's land, and as such cutting of a tree that has been suffered to grow to considerable size, is in general considered an unneighbourly act, great care must be observed that there be no excess, and that the cutting be as little injurious to the tree as possible; for if there be any excess, a jury will frequently give very considerable damages, especially if the trees were ornamental. (n)

If trees grow in a hedge, and near the land of another, and the fruit fall there, the owner of the tree may go into the adjoining land and take it, (o) but this would be only in cases of accident, and it should seem that the occupier of the land should be requested to deliver them, or permit entry, and should have refused, before the owner of the tree should enter to take the fruit. (p)

If a party have erected any building or other work on his own land, by the verbal license of the adjacent owner, although the statute against frauds enacts that no interest *in land* shall pass otherwise than by a memorandum in writing, duly signed, and although a parol license is in general revocable, yet in this case the party who gave the license cannot so far revoke it as to enable him to sustain *an action* against the other for *continuing* the erection; (q) and it should seem doubtful whether, after such revocation, the party could even abate the erection. (r) But in these cases, as the licenses were to erect on land, *not* of the party giving the license, in truth, no *interest* passed by the license, but it would probably be otherwise if the land were the property of the party giving the license. (r)

Secondly, Of the abatement of *Public* Nuisances.

With respect to the abatement of *Public* nuisances, private individuals are in many cases allowed to remove them, without

had originally been set in his. If they could form no opinion on this subject, he would afterwards give them his direction on the questions which they would then have to consider," *Holder* v. *Coates*, 1 Mood. &. M. 112; Car. & P., S. C. and notes.

In a note to this case it is observed, that in the new Code Civil of France, the difficulty has been avoided. By a minute and careful legislation, the boundary hedges and the trees in them are declared (Art. 670, 673) to be common property, "mitoyens." Except in certain cases the planting of other trees within certain distances of the hedge, is forbidden by art. 671. And if any are planted within these distances, the occupier of the adjoining land has the right of having them removed, and also of cutting the roots of trees growing into his land, by art. 672.

(n) In *Penoyre* v. *Adams*, the jury, in such a case, gave 500*l*. damages, but the verdict was set aside, and the cause was compromised; on Western Circuit; Selwyn for defendant.

(o) *Millen* v. *Fandrye*, Popham, 163; Vin. Ab. Trespass, L. a. and tit. Trees, E.

(p) *Anthoney* v. *Haney*, 8 Bing. 192, 193, *ante*, 644.

(q) *Winter* v. *Brockwell*, 8 East, 308; *Figgins* v. *Juge*, 7 Bing. 682, *ante*, 338.

(r) Id. ibid., *sed quære*, Sugden's Vend. & P. 8 ed. 75; *ante*, 338.

the interposition of any legal authority, and in others, certain inferior officers or persons, authorized by custom or particular statutes, may summarily do the like, as a leet jury, in destroying defective weights and measures.(*s*) It is clear that any one may justify the removal of a *common nuisance* whether on land or water; (*t*) and if a gate or wall be erected across or upon a *public* highway, so as to constitute a *common* nuisance, any of the king's subjects passing that way may *cut* or pull it down and even destroy it; (*u*) and it should seem that at common law, if the occupier of the adjacent land suffer trees to grow and hang over a highway so as to annoy passengers, any person may justify lopping the same so far as to avoid the nuisance, (*x*) though perhaps the occupier should be first required to lop them himself, and a reasonable time afterwards elapse, before another person should so interfere, (*y*) and it seems to be settled, though the principle seems questionable, that in abating a *public* nuisance, it is not so essential to avoid unnecessary damage as in the removal of a private nuisance; and that even the cutting down a gate across a public way is allowed, although it might have been opened without cutting. (*z*) However, as the contrary had previously been decided, it is always advisable to avoid any unnecessary mischief. And even after indictment and conviction for a nuisance for continuing a glass-house, the judgment would not be to prostrate the build-

(*s*) *Wilcock* v. *Windsor*, 3 B. & Adolp. 43; what the plea of justification must state, see *Shephard* v. *Hall*, Id. 433.

(*t*) Hale de Port. Mar., pt. 2, c. 7.

(*u*) *James* v. *Hayward*, Cro. Car. 184; Hawk. b. 2, chap. 75, s. 9.; *Lodie* v. *Arnold*, 2 Salk. 458; *infra*, note (*z*); 3 Bla. Com. 5, 6; *Rex* v. *Stead*, 8 T. R. 142; *Rex* v. *Inhabitants of Yorkshire*, 2 East, 342. But if the building, &c. complained of, be upon the whole productive of *more public benefit* than *detriment*, then the erection would be lawful or excusable, *ante*, 198, notes (*m*), (*n*); *sed quære*, Lord Tenterden *diss.*

(*x*) Hawk. b. 2, c. 76, s. 52, *ante*, 650.

(*y*) See *Earl Lonsdale* v. *Nelson*, 2 B. & Cres. 302; and such previous notice is required under the Highway act, 13 Geo. 3, c. 78, sec. 6, 7, 8; and see *Lowen* v. *Kaye*, 4 Bar. & Cres. 3; 6 Dowl. & R. 20, S. C.

(*z*) Hawk. b. 2, c. 75, s. 12; *Lodie* v. *Arnold*, 2 Salk. 458; trespass for breaking his close, and throwing bricks and other materials there lying, *erga confectionem domus de novo erect* into the sea. The defendant pleaded that it was a nuisance, being a house *built* across the way, and that he pulled down the walls, &c. and they rolled into the sea. The plaintiff demurred, but judgment was given for the defendant. *First*, The court seemed to agree that the trespass which the plea affected to justify, was not the trespass complained of, for that was throwing materials there lying, whilst that which was confessed, was pulling down a wall. *Secondly*, That where *H.* has a right to abate a *public* nuisance, he is not bound to do it orderly, and with as little hurt in abating it as can be, and therefore was not answerable in this case for the rolling into the sea. In the case of *James* v. *Haward*, Cro. Car. 184, the defendant might have opened the gate without cutting it down, and yet the cutting was holden lawful, and the court denied *Hill's Case*, 3 Cro. 384, that matter of aggravation need to be answered. But 3dly, The court held that the declaration was repugnant and insensible, for there could not be materials towards the building of a house erected which is already built, M. 9 W. 3, B. R.

ing, but only to prevent its being again used as such, (a) and though any individual may abate a nuisance, yet he must not remove the materials to an improper distance, or convert them to his own use. (b)

An entry to abate a nuisance immediately dangerous to the public safety, and which requires *immediate* abatement, may be made without any previous request, for necessity will then justify such an immediate entry. But where there is no such *immediate* necessity, some application and notice must be made and given to the owner of the soil, to abate the nuisance himself, (c) and even then, the nuisance cannot be so abated as to transfer its injurious consequences to another, unless it be to restore a river to its proper and *ancient* course. (c)

It seems to have been considered by the legislature, at least in the Highway Act, as regards public nuisances of omission, and even in some of commission, that the wrong-doer should have previous notice and request to remove the nuisance, before the surveyor or other public officer himself should commence a removal. (d)

Where a stack of chimneys, belonging to a house close to a highway, by reason of a fire, were in *immediate* danger of falling in the highway, it was held that firemen were justified in throwing the same down, and that they were not answerable for damages thereby unavoidably done to an adjoining house of a third person; (e) and upon the same principle, captains of ships may legally throw overboard cargoes, or part of cargoes, to save the lives of the crew. (e)

No person, however, can justify *placarding* a supposed house of ill-fame, or placing and keeping a lighted lamp opposite to the same in the day time, for the libel on the occupier would tend to a breach of the peace, and the nuisance should have been put down by legal means. (f)

Various acts relating to the metropolis and to Brighton, and other towns, give large powers to commissioners to abate

(a) Co. Ent. 92; and see as to steam engines, 1 & 2 Geo. 4, c. 41, s. 2.

(b) Dalt. c. 50; Burn's J. Nuisance, III., *ante*, 650.

(c) *Earl Lonsdale* v. *Nelson*, 3 D. & R. 556; 2 B. & C. 302, S. C.; *ante*, 650, n. (r). As to the right to obstruct the encroachments of the sea, see *Rex* v. *Pagham*, 8 B. & C. 355; 3 Chit. Pl. 1094, 1095; *ante*, 610; and as to encroachments in *rivers*, see *Menzies* v. *Earl Breadalbane*, 3 Wilson & S. 235; *Farquharson* v. *Farquharson*, A. D. 1741, cited id. *ante*, 199, n. (c), and *ante*, 610.

(d) 13 Geo. 3, c. 78, s. 12, *requires notice* to be given of annoyances and to remove them, before the surveyor can himself remove; sect. 12 & 13, as to cutting *hedges*; sect. 6 & 7, as to *trees* growing over; sect. 8, as to *ditches*; sect. 10, *stones*, *manure*, &c.

(e) *Dewey* v. *White*, 1 Mood. & M. 56, where see form of plea.

(f) *Jefferies* v. *Duncombe*, 11 East, 226; 2 Campb. 3, S. C.

CHAP. VII. REMEDIES BY PARTIES, &c.

obstructions, and to widen streets, &c.; but these, when derogatory of private right, are construed strictly. When unqualified, no action lies against the commissioners for any act done within their jurisdiction. (g) But the power of commissioners under the Metropolis Paving Act to remove projections affixed to houses, without making compensation, is limited to such things as actually project over the public ways, and an action of trespass is sustainable against a party who removes railings not so projecting. (h) So under the Highway Act, it was held that the 6th and 63d sections do not authorize the surveyor to widen a road to thirty feet by removing a fence, unless the fence supposed to be an encroachment was actually upon the highway. (i)

VIII. Of distresses and seizures.

VIII. *Distresses* of cattle or chattels, whether damage feasant or for rent, or for other claims, may also be properly considered in the nature of remedies by acts of the parties, without the intervention of legal authority, (k) although they frequently give rise to actions of replevin and other litigation.

First. When or not it is advisable to distrain damage feasant.

With respect to *Distresses Damage Feasant,* it would be beyond the scope of this work to attempt to state the whole law upon the subject, and we will therefore merely notice the general rules; and *first,* it had been considered that no person should distrain cattle damage feasant, unless it be certain that he has the legal title to the land, and not a bare possession, and that if his title should be questionable, he should be content to drive off the cattle and to bring an action of trespass to recover compensation for the damages, and which action is always sustainable against a wrong-doer; (l) and it had until lately been supposed, that if cattle should be distrained damage feasant and be replevied, the avowry in an action of replevin should state a seisin in fee, or other legal freehold estate, and not rely merely on the possession; and that if the legal title should prove insufficient, the distress would be illegal, although the cattle belonged to a mere trespasser, (m) and this although it had always been clear that in a plea to an *action of trespass* justify-

(g) *Houghton* v. *Butler*, 4 T. R. 364; *Boulton* v. *Crowther*, 2 B. & C. 703; 4 D. & R. 195, S. C.; *Leader* v. *Moxton and others*, 3 Wils. 461.

(h) *Bouverie* v. *Miles*, 1 B. & Adolp. 38.

(i) *Lowen* v. *Kaye*, 4 Bar. & Cres. 3; 6 Dow. & Ry. 20, S. C.

(k) 3 Bla. C. 5, 6.

(l) *Graham* v. *Peat*, 1 East, 244; 1 Saund. 346, e. in note. But see *Selby* v. *Bardons*, 3 Bar. & Adolp. 2.

(m) *Hawkins* v. *Eccles*, 2 Bos. & Pul. 359; 1 Saund. 284, 346, e. in notes. But see *Selby* v. *Bardons*, 3 Bar. & Adolp. 2.

ing the taking as a distress, it is sufficient to show mere possession. (n) But by a recent decision that distinction in the course of pleading and defence has been rendered at least questionable, so that probably a person in possession of land *might now as safely distrain as he might proceed in an action of trespass.* (o)

Secondly, In all cases, before making a distress, the party should well consider whether the trespass was not justifiable, either in respect of the state of the fences, which he ought to have repaired, or otherwise; and even then, as the making a distress damage feasant is usually considered an unneighbourly act, it would be better, if the owner of the cattle be known and solvent, to forbear to distrain, and rather to drive off the cattle and give notice of action, in case of future trespasses, and wait till considerable or repeated damages clearly exceed 40*s*. and then to proceed by *action* of trespass for all the injuries. (p) But if the owner of the cattle be unknown, then, in order to endeavour to secure satisfaction, a distress is advisable.

Thirdly, The cattle must be taken whilst actually upon the owner's land and in the very act of doing damage, and not after it is over, or at least after they have escaped from the land even whilst the party was pursuing them, or although the owner of them drove them off on purpose to prevent the distress; (q) and it has been recently considered, that if after distraining cattle the party drive them off into adjoining land and there leave them for a time, he cannot afterwards again drive them to a pound, and if he do, the owner may legally rescue them. (r)

(n) *Anon.* 2 Salk. 643; *Bullard* v. *Harrison*, 4 M. & S. 392; *Stott* v. *Stott*, 16 East, 343. *Quære* the distinction, *Dye* v. *Leatherdale*, 3 Wils. 20; Com. Dig. 3 M. 26; and see *Knowles* v. *Blake*, 3 M. & P. 214; 5 Bing. 499, S. C.

(o) *Selby* v. *Bardons*, 3 Bar. & Adolp. 2, decided by Parke and Patteson, Js. but Lord Tenterden *dissentiente*. That decision was merely that the *replication de injuria* is in each case proper; but *semble*, that the reasons would equally establish that an *avowry* in *replevin*, as well as a *plea* in *trespass*, may equally rely on the mere *possession* of the party who distrained. *Semble sed quære*.

(p) *Vaspor* v. *Edwards*, 12 Mod. 660; 1 Salk. 248, S. C.

(q) Co. Lit. 161, a.; Bac. Ab. Distress; *Vaspor* v. *Edwards*, 12 Mod. 661; and see *Knowles* v. *Blake*, 3 Moore & P. 214; 5 Bing. 499, S. C. *infra*, note (r).

(r) *Knowles* v. *Blake and another*, 3 Moore & P. 214, 218; 5 Bing. 499, S. C. The printed report of the facts in that case is exceedingly inaccurate, and indeed the learned Baron who tried the cause appeared to have greatly misunderstood the facts, and therefore the decision cannot be relied upon further than the *general* rule. The plaintiff distrained the defendant's cattle *damage feasant* on his (the plaintiff's close), and he *drove them* into a close of *the defendant's*, in the way towards his the plaintiff's yard, and then went to apprise the defendant of the circumstances, leaving the cattle in such close of the defendant's, where they remained half an hour. On the plaintiff's return he drove the cattle from the defendant's close to his own yard, and from thence into the public pound, from whence

So a horse, with its rider upon him, or goods in the actual use of the party, cannot be taken, because such a distress might lead to a breach of the peace; (*s*) and for the same reason, at common law, nets or ferrets could not be taken damage feasant in a warren, if they were in the hands of the person using them; (*t*) but by the recent acts we have seen that the tackle of fishers illegally fishing in a private fishery, (*u*) and the gins, snares or engines, and dogs of persons illegally in pursuit of *deer* in any forest, chase or purlieu, or inclosed land where deer are usually kept, (*v*) and game recently killed, in the possession of any person whilst he is trespassing upon any land in pursuit of game, (*x*) may be seized to the use of the owner. But in these cases the articles to be seized, it will be observed, are not to be taken as a distress damage feasant, but absolutely for the use of the party injured by the trespass, and they therefore become absolutely his, and consequently the destruction of the property seized would not now be illegal. (*y*)

Fourthly, The cattle, &c. taken, cannot be legally impounded after a tender of adequate amends and before impounding. (*z*)

they were liberated by the defendant's breaking open the pound; and it was held that this was not an illegal rescue or pound-breach, because the plaintiff by leaving the cattle in the defendant's close was an abandonment of the distress. And *per* Tindal, C. J., the distrainer is not bound to lay his hand upon the cattle; it is sufficient if he endeavour to prevent their escape from the field in which they are trespassing. But a distress for *damage feasant* is a matter of strict right, and if the party distraining permit the cattle to escape, or go out of his lands, his right is gone, and he has his remedy by action against the owner of the cattle for the injury done to his property. But a mere escape for a moment, if the distrainer immediately follows, would not be an abandonment of the distress, for Lord Coke (Co. Lit. 161, a.) says, "a rescous in law is, when a man hath taken a distress, and the cattle distrained, as he is driving of them to the pound, go into the house of the owner, if he that took the distress demand them of the owner and he deliver them not; this is a rescous in law." So here, if the plaintiff had followed the horses from his field into the defendant's "nursery," and instantly driven them back or taken them directly to his yard, we are all of opinion that this action might have been maintained, but as he allowed them to remain in the nursery for half an hour, and they were not demanded during that time, it was an abandonment of the right of freshly following them, and consequently an end of the distress. Lord Coke says, "if the cattle of themselves after the view go out of the fee, then cannot the lord distrain them." And in *Vasper* v. *Eddows*, (Holt's Rep. 257; 12 Mod. 658,) Lord Holt, C. J. said, "If a distress for *damage feasant* dies in pound or escapes, the party shall not distrain *de novo*, [but he may sue for the *trespass*, see *Williams* v. *Price*, 3 Bar. & Adolp. 695,] but if it were for *rent*, in either case he may distrain *de novo*. That is a far stronger case than this, as the horses had never been in the pound, (this is a mistake, they had been impounded in the public pound, and were rescued therefrom by the defendant,) we are therefore of opinion that a verdict must be entered for the defendant Blake, and that damages must be assessed by a jury against the defendant Sayers, who has suffered judgment by default."

(*s*) *Storey* v. *Robinson*, 6 T. R. 138.

(*t*) Hargrave's Co. Lit. note 13; *Read* v. *Burley*, Cro. Eliz. 550.

(*u*) 7 & 8 Geo. 4, c. 29, s. 35, *ante*, 624.

(*v*) 7 & 8 Geo. 4, c. 29, s. 29, but this does not extend to *other game*, *ante*, 623, 624.

(*x*) 1 & 2 Wm. 4, c. 32, s. 36, *ante*, 627.

(*y*) *Kingsworth* v. *Bretton*, 5 Taunt. 416; 1 Marsh. 106, S. C.

(*z*) *Anscomb* v. *Shore*, 1 Taunt. 261; *Lady Branscomb* v. *Bridges*, 3 Stark. 171.

And where cattle distrained damage feasant were in a private pound, and the distrainer admitted they were *about* to be forwarded to a public pound, it was held that a tender of amends made while they were in such private pound was not too late. (*a*)

Fifthly, Cattle distrained must not be beaten or wounded, or worked or used, and the doing either would render the party distraining liable to an action of trespass. (*b*) So the distrainer ought not to tie up cattle impounded; and if he should do so, and they be strangled, he would be liable in damages; (*c*) but if they die in the pound, without fault of the distrainer, the loss will fall upon the party distrained upon, (*d*) and if they should die or escape from the pound, without his default, he may sue for the trespass. (*e*) And the property distrained cannot be sold, but can only be impounded and kept as a pledge until compensation for the damage has been made; and if they should be illegally sold, the party distraining would become a trespasser *ab initio*. (*f*) So that if the owner of the cattle should be obstinate and refuse to replevy or pay damages, the party distraining would derive no advantage from his distress.

Sixthly, Supposing a distress *damage feasant* should be made and impounded in a *common pound overt*, the owner of the cattle is, in point of law, bound to take notice of it at his peril; but if the cattle be put in any *special* pound, overt or covert, the distrainer must give notice thereof to the owner; and in both the cases of pounds *overt*, the owner of the cattle, and not the distrainer, is bound to provide the beasts with food and necessaries. But if they are put in a pound *covert*, as in a stable, the distrainor must feed and sustain them. (*g*) In all cases it is the proper course to give the owner notice in writing of the impounding, and which may be in the form subscribed. (*h*)

(*a*) *Brown* v. *Powell*, 4 Bing. 230; 12 Moore, 454, S. C.

(*b*) Bro. Ab. Distress, 71; *Dye* v. *Leatherdale*, 3 Wils. 20; *Deane* v. *Clayton*, 1 J. B. Moore, 208; *Tyler* v. *Wall*, Cro. Car. 228; *Bagshawe* v. *Goward*, Cro. Jac. 147; *Oxley* v. *Watts*, 1 T. R. 12; *Forsdick* v. *Collins*, 1 Stark. R. 173; Bradby on Distresses, 241.

(*c*) *Vasper* v. *Eddows*, 1 Salk. 248; 12 Mod. 660, S. C.

(*d*) Id. ibid.; *Ricord* v. *Bettenham*, Burr. 1738; *Moore* v. *Pyrke*, 11 East, 54.

(*e*) *Williams* v. *Price*, 3 Bar. & Adolp. 695.

(*f*) Per Lord Hardwicke, C. J. 1 Selwyn's N. P. 6 ed. 684.

(*g*) Co. Lit. 47; 3 Bla. C. 13.

(*h*) Mr. *A. B.*—Take notice that I have this day distrained three horses, (or —— cows, &c. according to the fact,) which I am informed are your property, whilst the same were trespassing and doing damage to and upon my crop of wheat, (or oats, &c. according to the fact,) and other crops and herbage growing and being in a close in my occupation, called ——, in the parish of ——, in the county of ——, and I have impounded the said horses (or cows, &c.) for such trespass and damage in the common

Suggested form of notice of having distrained and impounded cattle damage feasant.

CHAP. VII. REMEDIES BY PARTIES, &c.

2. Of distresses for *Rent*, and when or not it is advisable to distrain.

2. In general if there be sufficient goods to countervail the arrears of RENT on the demised premises, a distress is preferable to an action, because the goods, unless replevied, may be sold after the expiration of five days, and thus produce speedier satisfaction than an action; and if replevied, the tenant must find responsible sureties for the return of the goods in case the action of replevin should terminate in favour of the distrainor; and if the sureties were not apparently sufficient at the time they were accepted, the sheriff would be liable to pay the value of the goods and costs in the event of their turning out insolvent; so that it is most probable that a landlord will, by distraining, ultimately obtain satisfaction; whereas if the tenant be arrested in an action for the rent and find bail, and judgment be obtained, the bail may render him to prison and no satisfaction may be obtained. But upon the other hand, the making a distress may be more annoying and injurious to the tenant and his family than an action even by arrest, and if resisted, judgment in replevin is seldom obtained so soon as in other actions. And in proceeding by distress great caution is requisite in the selection of an experienced agent or broker, for whose conduct throughout the landlord is by law responsible; and the very frequent irregularities in making or disposing of distresses lead to numerous vexatious or trifling actions, to prevent the accumulation of costs, in which, especially when for small damages, some regulation and restriction seem highly expedient. (*i*)

When an injunction in equity restrains from distraining.

Although a proceeding by distress seems in some respects in the nature of process, yet it is not legally considered as a proceeding *at law*, and therefore a common injunction in a court of equity restraining proceedings at *law* means in court, and does not extend to prohibit a distress for rent; and in many cases it may be advisable, notwithstanding a general injunction,

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pound, situate at, &c. where you must feed and provide for the same at your peril; and I further inform you that the damage done by the said horses to and upon my said close amounts to £——, the payment of which I hereby require, but I am ready to concur with you in having the same again fairly valued if you require. I have a further claim upon you for antecedent damage, and to which I request your attention to prevent the necessity for legal proceedings.

Dated, &c. Your's, &c.

(*i*) Distresses for rent are at present a most fertile source of litigation. It frequently turns out that the property distrained is very inadequate to pay the arrear of rent, and yet the insolvent tenant will cause two actions to be brought against his landlord, first, in *trespass*, for perhaps exclusion from a room or for staying a day too long upon the premises; and, secondly, in *case*, with several special counts for small irregularities, and perhaps nominal damages are recovered; but the costs will exceed the amount of many years' rent; or if the tenant fail in the action, he will still retain possession of the premises, and be discharged under the Insolvent Act.

for a landlord to distrain in order to secure the ultimate payment of an arrear of rent, to prevent which a special injunction, expressly prohibiting that proceeding, must be obtained. (*k*)

With respect to such *distresses* for *Rent* we can only notice the general rules. *First*, a distress can only be made when there is a *subsisting tenancy*, or has been such a tenancy within the last six months, and whilst the party still retains possession, and the title of the lessee continues. (*l*)

Secondly, There must be a *tenancy* under a *demise*; and the party distraining must have the immediate reversion, or an express power of distress reserved against a person subject to such a power; for if there be no tenancy but an adverse holding, or if the party be in possession under a mere prospective tenancy, as under an agreement for a lease without words of immediate demise, and there be no circumstances from which, in the mean time, a tenancy from year to year can be inferred, (*m*) or if there be no reversion, (*n*) then no distress can be made. But an admission of a tenancy suffices against the party making it. (*o*) Thus it has been held that if a person be let into possession under an agreement for a lease, which does not contain words of immediate demise, no distress can be made, unless from a previous payment of rent or other circumstance a tenancy from year to year can be inferred, and the only remedy is by action for use and occupation. (*p*)

Thirdly, The tenancy must also be at a *certain fixed rent*, or a rent readily ascertainable by calculation, for, as Lord Coke quaintly said, it is a maxim in law that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty; (*q*) and, consequently, where an estate has been let without in any way fixing the amount of the rent, the only remedy is by action; (*r*) but as *id certum est quod certum reddi potest*, if a man hold land paying so much per acre, although by the term of the demise the number of acres be not fixed, yet the lord may distrain. (*s*)

(*k*) *Hughes* v. *Ring*, 1 Jac. & W. 392.

(*l*) 8 Anne, c. 14, s. 7; Chit. Col. Stat. 665. The holding over must be *substantial*, and the merely leaving articles of furniture upon the premises, but not sleeping there nor retaining the keys, will not authorize a distress.

(*m*) What is a *demise* or not, *Stainforth* v. *Fox*, 7 Bing. 590, and cases there cited; and *ante*, 254 and 474.

(*n*) *Pluck* v. *Digges*, 2 Dow. & Clark Rep. 180; *Preece* v. *Corrie*, 2 Moore & P. 57; 5 Bing. 24, S. C.; *Regnart* v. *Porter*, 7 Bing. 451; and see *Prescott* v. *Boucher*, 3 Bar. & Adol. 849.

(*o*) *Cox* v. *Bent and others*, 5 Bing. 185; 2 Moore & P. 281, S. C.

(*p*) *Ante*, 254, 474; *Hegan* v. *Johnson*, Taunt. 148; *Dunk* v. *Hunter*, 5 Bar. & Ald. 322; *Tempest* v. *Rawling*, 13 East, 19; *Regnart* v. *Porter*, 7 Bing. 451.

(*q*) Co. Lit. 96, a.; Vin. Ab. Distress, E.; *Bussard* v. *Capel*, 8 Bar. & Cres. 141.

(*r*) *Regnart* v. *Porter*, 7 Bing. 451.

(*s*) Co. Lit. 96, a.; Vin. Ab. Distress, E.; *Bussard* v. *Capel*, 8 Bar. & Cres. 141.

CHAP. VII. REMEDIES BY PARTIES, &c.

Fourthly, Another rule is, that a distress for rent can only be made *upon the demised premises*, (*t*) unless under the statute, of *live* stock upon a common appurtenant, or in case of a fraudulent removal. (*u*) It was therefore held that where a wharf was demised, with the *use* of the water of an adjacent navigable river, but without any demise of the soil of such river, a barge upon the water, close to the wharf and attached thereto by ropes, could not legally be distrained for the rent thereof, because the place where it lay was not part of the thing demised. (*x*)

Fifthly, With respect to *the things* that may be taken under a distress for rent, wearing apparel when not in actual use, that is, upon the person of the occupier, may be taken; and that doctrine has been carried so far, that if the owner be in bed and the clothes near, they may in point of law be taken. (*y*) So implements of trade, when not in actual use, may be taken, although there be other sufficient property; (*z*) but it would be otherwise whilst they were in actual use. (*a*) Goods of third persons on the premises may also be taken, unless they were there in the way of trade, in which case they are privileged. (*b*) But a carriage standing at livery stables is not exempt. (*c*) However, whatever is fixed to the freehold, and not at the time separated therefrom, is not distrainable, although the owner might have a right to remove the same; (*d*) unless in the case of certain growing crops; (*e*) and growing trees in a nurseryman's ground, though removable by him, are not distrainable under that statute. (*f*)

Sixthly, In making a distress for rent, the goods taken may, under 11 Geo. 2, c. 19, s. 10, be impounded or secured "*in such place*, or in such part of the premises chargeable with the rent, as shall be most fit and convenient for the im-

(*t*) *Ante*, 661, n. (*s*); *Furneaux* v. *Fotherby*, 4 Campb. 136.

(*u*) 11 Geo. 2, c. 19; *Furneaux* v. *Fotherby*, 4 Campb. 136.

(*x*) *Buszard* v. *Capel*, 8 Bar. & Cres. 141; *ante*, 154.

(*y*) *Baynes* v. *Smith*, 1 Esp. R. 206; *Bissett* v. *Caldwell*, Peake's R. 36.

(*z*) *Fenton* v. *Logan*, C. P. 18 Apr. 1833, on motion for new trial by Storks, Serjt.; *Gorton* v. *Falkner*, 4 T. R. 565.

(*a*) Id. ibid.; *Watts* v. *Davis*, 1 Selw. N. P. 676.

(*b*) *Thompson* v. *Mashiter*, 8 Moore, 243; 1 Bing. 383, S. C.; *Matthias* v. *Mesnard*, 2 Car. & P. 353; *Gilman* v. *Elton*, 6 Moore, 243; 3 Bro. & B. 75, S. C.

(*c*) *Francis* v. *Wyatt*, 3 Burr. 1498; 1 Bla. R. 483, S. C.; *Crosier* v. *Tomkinson*, 2 Keny. 439.

(*d*) *Niblett* v. *Smith*, 4 Term R. 504; and see as to fixed machinery, *Duck* v. *Braddyl*, M'Clel. 217; 13 Price, 459, S. C. But for a wrongful distress the remedy should be trespass not replevin, id. *ante*, 94, note (*x*), 95.

(*e*) 11 Geo. 2, c. 19, s. 8, nor then if previously sold under a *fi. fa.*; *Peacock* v. *Purvis*, 2 Brod. & B. 362; 5 Moore, 79, S. C.

(*f*) *Clark* v. *Calvert*, 3 Moore, 96; *Clark* v. *Gaskarthy*, 2 Moore, 496.

pounding or securing the distress," and this should be effected without unnecessary disturbance or annoyance of the occupier, and the goods may with his consent be left in his use in the different parts of the premises; but if he object, then such goods as may be necessary to cover the rent in arrear and taxes and expenses should be placed and secured *in one room*, and possession kept of that only, leaving the rest of the house for the uninterrupted use of the occupier; but very slight evidence of the occupier's consent to the goods remaining dispersed as usual in different parts of a house and of a man remaining in possession would suffice; (*g*) and if not given, the party distraining might legally insist upon removing the goods. If the occupier, or his family, should be excluded from more than one room when large enough to contain all the property distrained, or if possession under the distress should be retained, without consent, for an *unreasonable* time after the *seventh* day, including that of taking possession, (*h*) then the party distraining, and all persons acting under him, will be subject to an action of trespass; (*i*) and the occupier's consenting to an extension of time is no waiver of any other irregularity or illegal step. (*k*) And if, after a distress for rent and before the actual impounding, the rent be tendered and refused, and the goods should be afterwards impounded, then, under 11 Geo. 2, c. 19, s. 19, the tenant may support trespass for the taking. (*l*)

Seventhly, The 2 W. & M. c. 5, (which first introduced the power of *sale* of a distress for *rent*,) enacts that a *notice* of the distress shall be given; and though a verbal notice would suffice, (*m*) it is usual and better to give it in writing and in the subscribed forms. (*n*)

(*g*) 11 Geo. 2, c. 19, s. 10; *Washborn* v. *Black*, 11 East, 405, n. (*a*). It should seem questionable whether without consent the party distraining has any right to *leave a man in possession*; at all events he would be justified in keeping possession of the goods only in one particular secure room, and not as usual of entering into every room he might please.

(*h*) *Pitt* v. *Shew and others*, 4 B. & Ald. 258, qualifying *Wallace* v. *King*, 1 Hen. Bla. 15; in *Pitt* v. *Shew and others*, 4 B. & Ald. 208, the jury held that retaining possession whilst selling even for *fourteen* days after the original seizure was not too long.

(*i*) *Etherton* v. *Popplewell*, 1 East, 139; *Winterbourne* v. *Morgan*, 11 East, 395; *Griffin* v. *Scott*, 2 Ld. Raym. 1424; 1 Stra. 717, S. C.

(*k*) *Sells* v. *Hoare*, 1 Bing. 401; *Willoughby* v. *Backhouse*, 2 B. & Cress. 821; 4 D. & R. 539, S. C.; *Harris* v. *Barry*, 7 Price, 690. The consent of the tenant will not justify the *longer* detention of a *lodger's* goods. *Fisher* v. *Algar*, 2 Car. & P. 374; 2 Moore & P. 374, S. P.

(*l*) *Virtue* v. *Beasley*, 2 Mood. & M. 21; *Etherton* v. *Popplewell*, 1 East, 139; *Winterbourne* v. *Morgan*, 11 East, 395.

(*m*) *Walker* v. *Rumbold*, 12 Mod. 76; 1 Ld. Raym. 53, S. C.; *Moss* v. *Gallimore*, 1 Dougl. 279; *Crowther* v. *Ramsbottom*, 7 Term R. 654.

(*n*) Mr. *A. B.*—Take notice, that I have this day *distrained* (*or* " that as bailiff to C. D., your landlord, I have this day distrained,") and *impounded* on the premises

Form of notice of distress unde.

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3. Distresses and seizures for other claims.

3. To the proceeding by distress for rent may be added distresses specially authorized, as *rent charges*, (*o*) or for *sewers' rate*, (*p*) *poor rate*, (*q*) or *highway rate*, (*r*) or under various particular acts of parliament, authorizing the levying *fines* or *penalties* by distress and sale. When, as in the case of a highway rate, or poor rate, a statute gives a *distress* for an arrear, that remedy only must be pursued, and no *action* can be main-

2 W. & M. sess. 1, c. 5, s. 2, and of having *impounded* upon the premises under 11 Geo. 2, c. 19, s. 10.

hereunder stated,* the several cattle, goods and chattels specified in the subscribed inventory, for the sum of £100, being one year's rent due to me (*or* " to the said *C. D.*") at Midsummer last,† for the said premises; and that unless you pay the said arrear of rent, with the charges of distraining for the same, within *five days* from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand this —— day of ——, in the year of our Lord, 1833.

Witness, *R. S.* *C. D.*

Inventory above referred to.

In the *stable* in your occupation, situate at ——, three horses; in the *cow-house* adjoining, four cows and three calves, &c. &c. (enumerating every chattel distrained and in what place taken).

Notice of having distrained growing crops on 11 Geo. 2, c. 19, s. 8.

Mr. *A. B.*—Take notice that I have this day taken and distrained (*or* " that as bailiff to *C. D.*, your landlord, I have taken and distrained,") on the lands and premises hereunder mentioned, and there impounded the several growing crops specified in the subscribed inventory, for the sum of £——, &c. (*as in last*) for the said lands and premises, and that unless you previously pay the said rent, with the charges of distraining for the same, I shall proceed to cut, gather, make, cure, carry and lay up the said crops, when ripe, in the barns or other proper place, on the said premises, and in convenient time to appraise, sell and dispose of the same, towards satisfaction of the said rent and of the charges of such distress, appraisement and sale, according to the form of the statute in such case made and provided. Given under my hand, &c. (*as in last*).

Notice of a distress for the arrears of a rent charge or annuity charged on land, with express power of distress.

Take notice, that by order and on behalf of *C. D.* I have this day taken and distrained in and upon the farm and lands called ——, in your occupation, in the parish of ——, in the county of ——, all the *severed*‡ corn, grain and effects in the inventory hereunder written mentioned, for the sum of £——, being —— years' annuity or rent charge of £—— *per annum*, due to the said *C. D.* at —— last, and charged on, and issuing and payable out of certain manors, farms, lands and premises called ——, in the said parish of ——, in the county of —— aforesaid, of which the farm and lands first above-mentioned are part and parcel, and that unless the said arrears of the said annuity or rent-charge, together with the expenses of this distress, are paid and satisfied, the said corn, grain and effects will be disposed of according to law. Dated, &c.

To Mr. *A. B.* and all others whom it shall concern. *E. F.*

(*o*) 4 Geo. 2, c. 28, s. 5; *Bradbury* v. *Wright*, Doug. 627; but it cannot be made upon a person who became tenant *before* the grant, 1 Rol. Ab. 669, pl. 45; see form of notice of distress for rent charge, *supra*.

(*p*) 7 Ann. c. 10.

(*q*) 43 Eliz. c. 2, s. 4; 17 Geo. 2, c. 38, s. 7; 34 Geo. 3, c. 170, s. 12; *Hutchins* v. *Chambers*, 1 Burr. 589; under these acts the distress for poor rates may be made in any place.

(*r*) 13 Geo. 3, c. 78, s. 67; *Heudebourck* v. *Langton*, 10 Bar. & Cres. 546.

* The 11 Geo. 2, c. 19, s. 10, authorizes impounding on the premises, *Griffin* v. *Scott*, 2 Ld. Raym. 1424; 1 Stra. 717, S. C.; *Swann* v. *Earl Falmouth*, 8 B. & C. 456. If elsewhere, say, " and impounded in a certain yard and premises situate, &c."

† It is not necessary to mention when the rent became due. *Moss* v. *Gallimore*, Dougl. 279; but if mistated the mistake would not be material, *Crowther* v. *Ramsbottom*, 7 T. R. 654.

‡ A distress for a rent-charge cannot be made upon growing crops, or upon a common appurtenant, under 11 Geo. 2, c. 19, s. 8, unless under express power, *Milter* v. *Green*, 8 Bing. 92, *ante*, 227, note (*e*).

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tained. (s) But as the power to distrain on standing crops, or of cattle upon a common, is only given in case of *rent service*, such crops or cattle cannot be taken under a distress for arrears of an annuity or rent charge. (t)

Seizures and distresses for *heriots* are also remedies by the act of the party entitled to them, which may be properly classed under this head. (u) For heriot service, which is a species of rent, the lord may distrain or seize; but for heriot custom he can only *seize* the identical heriot, and cannot distrain any other chattel. (x) The like speedy and effectual remedy of *seizure* is also given by law with regard to many things that are said to lie in franchise, as waifs, wrecks, estrays, and deodands, which may be taken without the formal process of a suit or action. (y)

IX. Of obtaining satisfaction by a set-off.

IX. The *setting off* one debt against another may also be treated as a mode of preventing a loss by the act of a party himself. At common law, when there were *cross* demands not arising out of the same transaction, nor agreed by the parties to be applied in payment of each other, each party must have paid his debt, and brought an action against the other, at the risk of his ability at the end of the suit to obtain actual satisfaction. The statutes 2 Geo. 2, c. 22, s. 13, and the 8 Geo. 2, c. 24, and the 6 Geo. 4, c. 16, s. 50, as to bankrupts, rectify this evil, and enable debts and mutual credits to be set off against each other, and the balance only is recoverable by either party. (a) These acts extend to inferior courts and courts not of record, as the County Court, (b) but not to Courts of Request. (c) A party may waive his right of set-off; (d) but on the other hand a creditor may, by refusing to receive payment of more than the balance, insist upon and compel the other party to avail himself of the set-off, at least so as to preclude him from suing on his side of the account. (e)

(s) *Stevens* v. *Evans*, 2 Burr. 1157; *Underhill* v. *Ellicombe*, 1 M'Clel. & Young, 450; *Heudebourck* v. *Langton*, 10 Bar. & C. 546.

(t) *Miller* v. *Green*, 8 Bing. 92.

(u) As to these in general, see 2 Saund. 168, note 1; 3 Bla. C. 15.

(x) Id. ibid.; *Odiham* v. *Smith*, Cro. Eliz. 590; *Major* v. *Brandwood*, Cro. Car. 260.

(y) 3 Bla. C. 15.

(a) See the acts and decisions, Chitty's Col. Stat. 874 to 879.

(b) In the County Court a set-off may be pleaded, but as the defendant can only plead *several* pleas to the same matter in Courts of Record, the defendant should plead *non assumpsit*, except as to the part which he knows he cannot dispute, or that his set-off will fully cover, and then plead the set-off as to that part.

(c) Tidd, 9 ed. 1191, note (q) *sed quære*.

(d) *Brown* v. *Pigeon*, 2 Campb. 95; *Hennell* v. *Fairlamb*, 3 Esp. R. 104.

(e) *Laing* v. *Chatham*, 1 Campb. 252; *Hennell* v. *Fairlamb*, 3 Esp. R. 104.

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Under the above acts there is a mode, in case of contracts, by which a creditor may, by his own act, sometimes obtain satisfaction of a debt from his insolvent debtor, even by surprise or *stratagem*, i. e. by a *concerted set-off*. Thus it has been held, that if the purchaser of goods offer to the vendor, as payment of the price, an overdue bill, which the vendor continues liable to pay, this is a good payment; and where the defendant, who had ordered goods, and even expressly engaged to pay *ready money*, and then, in lieu of cash, sent to the vendor's agent a bill accepted by such vendor, which had been due and dishonoured before the goods were ordered, and the agent at first refused to take the bill, but ultimately carried it to the vendor, who kept it, and the vendor afterwards became bankrupt, it was held, in an action brought by his assignees, to recover the value of the goods, that this transaction was equivalent to payment; (*f*) but if the bill had not been due, it would have been otherwise. (*g*) So where the plaintiff declared *in indebitatus assumpsit* for goods sold, it was decided that the defendant might set off money due upon a bill accepted by the plaintiff, although the defendant agreed to pay ready *money* for the goods. (*h*) And a plaintiff cannot, when the real transaction is strictly that of a contract or debt, by declaring specially for not accounting, deprive the defendant of a set-off, of which he might have availed himself in case the declaration had been generally for money received. (*i*) However, in a special assumpsit for not paying over money pursuant to agreement, (*k*) or for breach of duty in not handing over the proceeds of a bill delivered to the defendant to get discounted, (*l*) it has been held a defendant cannot avail himself of a set-off. In some of these cases it will be seen that a person who *holds* the bill or note of a party in doubtful circumstances, may by manœuvre often obtain satisfaction of the debt by purchasing goods as for ready money, and then instead of actually paying in money, tendering the overdue bill in satisfaction. So if it be suspected that a party to a bill is about to become insolvent or bankrupt, the holder may, before notice of an act of bankruptcy, at any time before the date of the commission, indorse it to a party who is

Mayer v. *Nias*, 1 Bing. 311; 8 Moore, 275, S.C.; *Eland* v. *Karr & others*, 1 East, 375; *Fair* v. *M'Iver*, 16 East, 130.

(*g*) *In re Goodchild*, 2 Law J. 187.

(*h*) *Cornforth* v. *Rivett*, 2 Maule & S. 510; *Eland* v. *Karr*, 1 East, 375; 13 Ves. J. 180; *Mayer* v. *Nias*, 8 Moore, 275; 1 Bing. 311, S. C.; *M'Gillivray* v. *Simson*, 9 Dowl. & R. 35, 2 C. & P. 320, S. C.

(*i*) *Birch* v. *Depeyster*, 4 Campb. 385.

(*k*) *Colson* v. *Welsh*, 1 Esp. R. 378; *Lechmere* v. *Hawkins*, 2 Id. 626.

(*l*) *Thorpe* v. *Thorpe*, 3 Bar. & Adolp. 580, 584, 585.

debtor to the bankrupt, and who may discharge his debt by setting off the bill in his hands, provided he also, at the time he received the bill, was ignorant of any act of bankruptcy. (m)

Supposing the debtor should also be a creditor, but upon a negociable bill or note, then, to prevent the holder from transferring it to a third person, and thereby avoiding the set-off, it will be necessary for the debtor to file a bill in equity, to restrain him from so transferring the bill, (n) and it should seem that this even would be requisite, although the bill is already over due. (o)

X. Of setting off judgment and costs against each other.

X. In cases of torts, or of debts that cannot be set off under the above statutes, and indeed, independently of such statutes, if there be cross actions or suits, the superior courts, in favour of this equitable mode of adjusting accounts between the same parties, or where the parties are the same substantially, at common law, allow one judgment to be set off against tbe other, (p) and also costs in equity to be set off against costs at law, (q) and this extends even to interlocutory costs; (r) and the court will sometimes even stay execution in one action till judgment has been obtained by the defendant therein, viz. a cross action, so as to enable the latter afterwards to obtain such set off. (s)

XI. Of remedies by Retainers, Lien, &c.

XI. Another recognized mode of remedy, without legal process, may be arranged under this head, though strictly it is considered as redress by *mere operation of law*, viz. *Retainers*, which is, where a creditor is by his debtor made his executor, (t) or one of his executors, (u) or where the creditor obtains letters of administration to his intestate debtor, (x) or where a creditor becomes heir to his debtor, (y) in all which cases the executor or administrator, as he could not sue himself, has a right, if he think fit, to pay himself, or retain assets that come to his hands, before and as against any other creditors in equal degree. (z) So if a debtor be made executor of his creditor, this at *law* operates *as a release* of the debt, it being

(m) *Hawkins* v. *Whitten*, 10 B. & C. 217; *Dickson* v. *Cass*, 1 Bar. & Adol. 343.

(n) *Ex parte Harding*, 1 Buck, 24.

(o) *Burrough* v. *Moss*, 10 Bar. & Cres. 558; 8 Law J. 287, K. B., S. C.

(p) Tidd, 9 ed. 991, 992; *Simpson* v. *Hanley*, 1 Maule & Sel. 696; *Sherlock* v. *Burned*, 6 Bing. 21; *Henel* v. *Lord Egmont*, Id. 61; and see the cases in equity, Chitty's Eq. Dig. 1202, and *post*.

(q) *Webber* v. *Nicholis*, 4 Bing. 16.

(r) *Doe* v. *Carter*, 8 Bing. 330.

(s) *Masterman* v. *Malin*, 7 Bing. 435.

(t) 1 Rol. Ab. 922; *Paramour* v. *Yardley*, Plowd. 543, *ante*, 534, 535.

(u) *Chatham* v. *Ward*, 1 Bos. & P 630.

(x) *Pyne* v. *Erle*, 8 T. R. 407.

(y) *Sawley* v. *Gower*, 2 Vern. 62.

(z) Id. ibid.; 3 Bla. C. 18; 2 Bla. C. 512.

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presumed that the testator intended to forgive the debt; besides, the executor could not sue himself. (*a*) But if a debtor be appointed *administrator*, no presumption of an intended release arises, and therefore, although the legal remedy is suspended during his life, yet after his death his legal representative may be sued for the recovery of the debt by a succeeding administrator *de bonis non*. (*b*) In equity, however, the debt of an executor shall not be released, even as against legatees, if the presumption arising from his appointment be contradicted by the express terms or a strong inference from the will; as where the testator directed a specific legacy to be paid out of such debt. (*c*) So if he leave the executor a legacy, that indicates that he did not mean to release the debt, and in such case the executor is trustee to the amount of the debt for the residuary legatee or next of kin. (*d*) So an executor without a legacy, where it appeared that the testator considered him a mere trustee of his whole property, was held not to be discharged from his debt. (*e*)

Of the right of Lien, or Retainer in general.

But with the exception of the powers of distress and seizure, and of these rights of set-off and retainer, and the right of retaining possession of certain tangible personal property, on the ground of *Lien*, (which rights, we have seen, are very limited,) no person has a right, either at law or in equity, to detain or withhold the property of another, either in compensation or security for any debt or damage he may claim from the owner; and therefore, as a measure of precaution, the right of lien, and also the sale thereof, should always be *expressly* stipulated for. (*f*) We have seen that a solicitor has no lien on a will, (*g*) nor has he in any case where the retention of a lien would affect a trust. (*h*)

(*a*) 2 Bla. C. 512; *Woodward* v. *Lord Darcy*, Plowd. 184; *Waukford* v. *Waukford*, 1 Salk. 299, 303; 1 Rol. Ab. 921.

(*b*) *Lockier* v. *Smith*, 1 Sid. 79; *Waukford* v. *Waukford*, 1 Salk. 303; *Freakley* v. *Fox*, 9 B. & C. 130, and 1 M. & Ry. 18, S. C.

(*c*) *Flud* v. *Rumsey*, Yelv. 160.

(*d*) *Caring* v. *Goodinge*, 3 Bro. Ch. R. 110; C. T. Talbot, 240; Bro. P. C. 180; 2 Fonbl. Eq. 325.

(*e*) *Berry* v. *Usher*, 11 Ves. 87; *Simmons* v. *Gutheridge*, 13 Ves. 262.

(*f*) *Ante*, 122, and 492.

(*g*) *Ante* 513, note (*o*).

(*h*) *Baker* v. *Henderson*, 1 Clark & Fin. 27.

CHAPTER VIII.

OF THE PREVENTION OF INJURIES BY LEGAL AUTHORITY.

I. Of those means of Prevention in general.
II. Prevention by imprisoning a Lunatic.
III. ———— presence of a Justice of the Peace or Peace Officer.
IV. ———— by a Justice's Warrant.
V. ———— by Chief Justice's Warrant to prevent a Duel, &c.
VI. ———— by Security to keep the Peace or be of good Behaviour.
First. By Justices of Peace.
Secondly. By Court of K. B.
Thirdly. By Court of Chancery.
VII. Prevention of Imprisonment, and obtaining Release.
First. By Habeas Corpus.
Secondly. By Summary Application.
VIII. Preventions by Proceedings in Superior Courts.
First, In Courts of Law.
Secondly, In Courts of Equity.
Injunction Bills *in general* to prevent *irreparable* injury.
But not Crime or Libel.
Nor breach of mere Personal Contract or Small Injury.
1. Relating to the PERSON.
1. Absolute Rights.
2. Relative Rights.
Between Parent and Child, and Guardian and Ward, &c.
2. Relating to PERSONAL Property.
1. As Injunctions against partners.
2. ———— against Agents.
3. Injunctions to restrain Negociation of Bills.
4. ———— to have Deeds delivered up.
5. Injunctions to prevent Breach of Trust, &c.
6. ———— to prevent Breaches of Contract.
7. ———— to prevent Improper Payments and Sale, &c.
8. ———— *quia timet,* to prevent loss or inconvenience.
9. ———— to prevent Waste by Executors, &c.
10. ———— to prevent sailing of a Ship.
11. ———— to prevent Piracy of Copyright, &c.
3. Relating to REAL PROPERTY.
1. Injunctions to prevent Loss—Boundary Bills.
2. ———— to prevent Wasteful Trespasses.
3. ———— to quiet Possession.
4. ———— to prevent Waste.
5. ———— to prevent Nuisances.
1. Private.
2. Public.
4. To Prevent Injuries from Litigation in *nature* of Injunctions.
1. By Writ of *ne exeat regno.*
2. Bill to perpetuate Testimony.
3. Bill to restrain actions, &c.
4. Bills of Interpleader.
5. Motions in Courts of Law.
IX. To prevent Loss in other Particular Cases.
1. Protests for *better Security.*
2. Proceedings in London against a *Fugitive Debtor.*

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1. Of Preventive Measures by intervention of Legal Authority *in general.*

WE have now to consider the *preventive remedies by the intervention of some competent legal authority* or proceeding, whether *summary* or *formal,* as distinguished from preventions by the mere act of parties, considered in the last chapter.(*a*) We have adverted to the legal maxim as declared by North and Tenterden, C. Js. that, "*laws for prevention are even prefer-*

(*a*) See division of the subject, *ante,* 586, 587.

CHAP. VIII. PREVENTION OF INJURIES LEGALLY.

able to laws for punishment," and upon that principle it was decided that a custom for the homage to choose every year two surveyors, to take care that no unwholesome victuals should be sold within the manor, and with power to destroy whatever corrupt victuals they found exposed to sale, was valid; (*b*) and that a custom in a manor for the leet jury to break and destroy measures found by them to be false is also lawful; (*c*) and on the same principle, the acts were passed relating to weights and measures, giving justices of the peace power to order the destruction of such fraudulent weights and measures, and at the same time preserving and continuing every local custom or usage to the same effect. (*d*) The same principle induced the passing of the *vagrant* act, and all the summary powers enabling justices and others to apprehend certain suspicious individuals, to prevent them from committing a crime. (*e*)

II. Imprisonment of a lunatic to prevent mischief.

II. The first proceeding of this nature, besides those referred to, is to *prevent* mischief from a *Lunatic*. At *common* law any person might justify confining, and as it has been said *beating*, (that is *restraining*,) his friend in such a manner as may be essential under such circumstances; (*f*) and a private individual may arrest a lunatic who seems disposed to do mischief. (*g*) But a medical man is not warranted, merely on statements made by the relation of a person supposed to be insane, in sending men to take him into custody and confining him, unless he be satisfied that those statements are true, and that such a step is necessary to prevent some immediate serious injury from the individual either to himself or to other persons; and if access cannot be had for the purpose of proper examination, application should be made to the Lord Chancellor that the party may be taken up under his authority. (*h*) When there is danger of a lunatic committing any crime or offence or serious mischief, for which if sane he would be *criminally* punishable, the proper course is to proceed under the 39 & 40 Geo. 3, c. 94, s. 3, which enacts, "that for the better prevention of crimes being committed by persons insane, if any person shall be discovered and apprehended

(*b*) *Vaugham* v. *Attwood and others*, 1 Mod. 202.

(*c*) *Willcock* v. *Windsor*, 3 Bar. & Adolp. 43; *Sheppard* v. *Hall and others*, Id. 433.

(*d*) Id. ibid.; 55 Geo. 3, c. 43, s. 112.

(*e*) See them enumerated, and the powers of the several acts considered, as far as they authorize *private individuals* to *apprehend*, &c. *ante*, 619 to 631.

(*f*) Hawk. P. C. c. 60, s. 23; Burn's J. Arrest.

(*g*) *Brookshaw* v. *Hopkins*, Loft, 243; Bac. Ab. Trespass, D. 3.

(*h*) *Anderdon* v. *Burrows and others*, 4 Car. & P. 210.

under circumstances that denote a *derangement of mind*, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, and any justice before whom such person may be brought shall think fit to issue a warrant for committing such person as a dangerous person suspected to be insane, such cause of commitment *being plainly expressed in the warrant*, the person so committed shall not be bailed except by two justices, one whereof shall be the justice who issued such warrant, or by the quarter sessions, or by one of the Judges or Lord Chancellor, Lord Keeper or Commissioners of the Great Seal."(*i*)

Independently of this power, and of the other enactments relating to lunatics, neither a court of common law, nor the judges, have any power to interfere with the person of a lunatic when he has been *arrested*, so as to take him out of the custody of the sheriff or his officer,(*k*) either before or after a commission of lunacy has been found.(*l*) But it should seem that the Lord Chancellor has jurisdiction in any case, even before a commission, upon proper application, to order in whose custody a dangerous lunatic shall be placed;(*m*) and after a commission has been established by the verdict of a jury, it is clear that the Chancellor may order that the lunatic shall be delivered to the committee, and that an *habeas corpus* is unnecessary.(*n*)

If a lunatic be likely to commit any injury, for which he might if sane be indicted, and the immediate interposition of the Lord Chancellor cannot be obtained, then it would be prudent to apply to a justice of the peace under the before mentioned 39 & 40 Geo. 3, c. 94, s. 3, (*o*) and to make oath of the derangement of mind, and of the apprehended purpose of committing some crime, and thereupon the justice should by warrant commit the party as a *dangerous person*, suspected to be insane; and as the act enacts, that the person so committed shall not be bailed except by two justices, or by one of the judges, or the Lord Chancellor, it should seem that the party so committed could not be legally removed by the sheriff under bailable process, or even in execution.(*p*) There is a prescribed form of such a warrant of commitment, and it should seem that it need not

(*i*) This act, it will be observed, extends to every description of deranged persons, whereas the 17 Geo. 2, c. 5, s. 20, only extended to vagrant lunatics, 2 Atk. 52.

(*k*) *Nutt* v. *Verney*, 4 Term R. 121; *Kernot* v. *Norman*, 2 Term R. 390; *Ibbitson* v. *Galway*, 6 T. R. 133; Tidd, 9th ed. 216.

(*l*) *Steel* v. *Alan*, 2 Bos. & Pul. 362; *Anderson's Bail*, 2 Chit. R. 104.

(*m*) See cases in notes (*k*) and (*l*); and see *Anderdon* v. *Burrows*, 4 Car. & P. 210.

(*n*) *Ex parte Cranmer*, 12 Ves. 445; *Lord Ely's case*, 1 Rid. P. C. App. 518.

(*o*) *Ante*, 670.

(*p*) *Semble, sed quære.*

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state the name of the person towards or upon whom the assault or crime was expected to be committed, nor need it appear on the warrant that the evidence given before the justice was upon oath. (q)

III. Preventions by application to a *Magistrate* or *Peace officer*.

III. In case a felony or a serious breach of the peace, or disturbance, or other illegal act constituting a misdemeanor, be expected, then it is advisable, either by application to a magistrate or to a constable, or other peace officer, to cause him to attend, so that if he have information of any felony, or view of any actual breach of the peace, he may immediately interfere and apprehend the wrong-doer; and on any information that a breach of the peace is about or likely to ensue, it is the duty of every justice of the peace and constable within his district to attend and prevent it. (r) The very appearance of a known officer will frequently prevent or at least interrupt the apprehended illegal act. This is also advisable in anticipation of all large and open assemblies of persons of all classes, especially when for convivial sports or amusements, which so frequently lead to extra excitements, quarrels, and breaches of the peace, unless immediately restrained by some legal authority. We have seen some of the cases in which a peace officer may and ought to interfere without warrant, and others will be found in the books referred to in the notes. (s) Such officers are generally better informed of the powers of interference and arrest and the modes in which it may be made, than any private individual who may call for their assistance, and who may afterwards act with more security and indemnity in the assistance of the constable, for then he has the protection of the statutory provisions, generally extending to all persons *bonâ fide acting in aid of a peace officer*. (t)

Appointment of *special* constables.

On the reasonable expectation of any *actual tumult*, *riot*, or *felony*, (but of which it is necessary that some person should make oath before a magistrate,) and for prevention thereof, and before the same has actually occurred, or whilst it is in progress, or likely to be repeated, any *two justices* may appoint *special constables* for the preservation of the public peace, and

(q) *Rex* v. *Gourlay*, 7 Bar. & Cres. 669; 1 Man. & Ry. 619, S. C., see form of warrant id. ibid. and 3 Burn's J. 26th ed. 699.

(r) *Per* Bayley, J., in *Rex* v. *Bellingham*, 1 M. & R. M. C. 127; 2 Car. & P. 234, S. C. and *Rex* v. *Perkins*, 4 Car. & P. 537, *ante*, 36, note (g).

(s) Burn's J. Arrest, Constable, Police, Vagrant; and see *Rex* v. *Perkins*, 4 C. & P. 537, *ante*, 36, note (g).

(t) 21 Jac. 1, c. 12, sect. 5; 1 Burn's J. 26 ed. 802 to 806.

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the protection of the inhabitants, and the security of property, and who are to perform the same duties as common law constables, and in case of neglect each forfeits £5, and is subject to other liabilities. (u) And it would be an *indictable misdemeanor* if magistrates should *perversely*, and after tender of such oath, neglect to appoint them when requisite; (x) but by the above statute, as well as the prior act 1 Geo. 4, c. 37, it is necessary for some person to make oath that a riot is expected before a magistrate can legally appoint or call out special constables. (y)

It is the duty of justices of the peace, when they are informed that a breach of the peace is likely to take place, *in person* to attend, or at least to send peace officers to prevent it; (z) and as all persons present countenancing a prize fight are guilty of an offence, whenever a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they should refuse to enter into securities, then to commit them. (a)

IV. Of apprehending supposed offenders under a *Warrant* of a justice.

IV. If a magistrate have jurisdiction, his error in issuing a warrant to apprehend, or in committing a person to take his trial for a supposed offence, will not subject *him* to an action of trespass; (b) and this, although the depositions were improperly taken in the words of the act, and not in those of the witness. (c) But if he had no jurisdiction at all, or if it had ceased, it would be otherwise. (c) And sometimes the proceeding *irregularly* will in effect be equivalent to the want of jurisdiction; as if a magistrate maliciously issue a warrant, without any information upon oath, when that preliminary is required by law, in that case he might be a trespasser. (d) In general, whether for the purpose of searching for goods supposed to have been stolen, or for apprehending a supposed offender, the safest course is for an injured individual to go before a justice and *dispassionately* to state the facts of the

(u) 1 & 2 Wm. 4, c. 41.

(x) *The King* v. *Pinney, Mayor of Bristol*, trial at Westminster, K.B., 1 Nov. A. D. 1830.

(y) *Per* Littledale, J. and the whole court, in *The King* v. *Pinney*, Esq. Id. ibid.

(z) Dalt. J., c. 1; Burn's J. Justice, 26 ed. 448.

(a) *Per* Bayley, J., *Rex* v. *Bellingham*, 2 Car. & P. 234; and 1 M. & R. M.C. 127, S. C.; and *Rex* v. *Perkins*, 4 Car. & P. 537; *ante*, 36, note (g).

(b) *Crepps* v. *Durden*, Cowp. 640.

(c) *Mills* v. *Collett*, 6 Bing. 85.

(d) *Morgan* v. *Hughes*, 2 T. R. 225; but see *Lowther* v. *Earl of Radnor*, 8 East, 113.

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supposed felony, and as he is assured he will thereafter be able to prove them by some *third person*, and not *to press* the magistrate to issue his warrant, but to leave him to interfere or not of his own accord; and then in general the informer will not be responsible for the consequences, in case the magistrate should erroneously issue his warrant, (*e*) when if a party should *maliciously urge* a magistrate erroneously to grant his warrant, then such party might be liable to an action, though the magistrate would not. (*f*) But the proceedings by warrant in general suppose an offence to have been *completed*, and therefore will be more properly considered on a future occasion.

V. Application to the Chancellor or *Chief Justice*, or other *Judge* of K. B. to prevent a *Duel*.

V. Although in ordinary cases, on the apprehension of a duel or breach of the peace, application to prevent it should be immediately made to justices of the peace, as presently directed, yet, when a *Duel* is expected between persons of rank and consideration, it may be expedient to apply to the Chancellor, or Chief Justice, or other Judge of the Court of King's Bench, (*g*) who will sometimes send for the parties, and require their pledge of honor not to proceed to any violent measures, or will, as the most certain course, issue his warrant in the first instance, and require them with sureties to enter into a formal recognizance to keep the peace towards each other, and which will preclude them, not only in honour, but legally, from even leaving the country to fight on the continent, as a duel out of the kingdom, between parties, one of whom is a British subject, would be as penal and punishable as a duel within the king's dominions, and equally constitute a breach of the recognizance. (*h*)

VI. Prevention by requiring *Sureties to keep the Peace* or be of *good behaviour*.

VI. Whenever an injury to the person has been threatened, or the burning of a house, one of the most effectual modes of preventing injury is to obtain *sureties to keep the peace* or *be of good behaviour*, the latter of which includes the same thing; since if the threatener should find sufficient sureties, he would probably be deterred from committing the injury by the apprehension of subjecting his sureties to the payment of the stipu-

(*e*) *Ante*, 630.

(*f*) *Smith* v. *Elsee*, 1 Dowl. & Ry. 97; 2 Chit. R. 305; *ante*, 630, n. (*g*).

(*g*) Each of these has, as incident to his office, general authority to keep the peace throughout the realm, and to award process for the surety of the peace, and to take recognizance for it, Hawk. b. 2, c. 8, s. 2; and Burn's J., Justices of Peace, I. It is most usual to apply to the Chief Justice to prevent a *Duel*.

(*h*) *Rex* v. *Roche*, 1 Leach, 160; *Rex* v. *Sawyer*, R. & R. C. C. 294; Car. C. L. 103, 104; 9 Geo. 4, c. 31, s. 7; *Rex* v. *Helsham*, 1 Burn's J., Duelling, 1026.

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lated forfeiture, and if no sureties be found, then he must remain in prison. (i)

By the very terms of their commission, and at common law, and under the 34 Edw. 3, c. 1, and the constructions thereon, *justices of the peace*, and each of them, are appointed to *keep the king's peace*, "and to cause to come before them, or any of them, all those who to any one or more of our people concerning their *bodies* or the firing of their *houses* have used *threats*, to find sufficient *security for the peace* or their *good behaviour* towards us and our people; and if they shall refuse to find such security, then keep them in our prisons until they shall find such security to cause to be safely kept."(k) The authority to take sureties to keep the peace was at common law; that to require sureties for good behaviour is founded upon the 34 Edw. 3, c. 1, which, although limited in its words, "and to take of all them that be *not of good fame* sufficient surety and mainprize for their *good behaviour* towards the king and his people, to the intent that the people be not by the rioters and rebels therein mentioned troubled nor endangered, nor the *peace* blemished," has by the construction of the statute been extended to other injuries than might affect the bodies or dwellings of persons, or amount to a breach of the peace; as to divers misbehaviours *not directly* tending to a breach of the peace, many instances of which are stated by Dalton, and are enumerated by Dr. Burn,(l) as to a person who bought ratsbane and mingled it with corn, and then cast it among his neighbour's fowls, whereby most of them died, and to night walkers, and eves droppers and suspected persons, common gamesters, *libellers*, (m) abusers of justices whilst in execution of their office, and persons guilty of forcible entry, or threatening a person attending a court of justice, &c. (n). But Dr. Burn observes, that whatever power in these cases the Court of K. B. may have, yet at least one justice should in prudence only require sureties for the peace or good behaviour in those cases which constitute a *breach of the peace* or tend to it, or to offences which clearly establish that an offender is not of good fame, or those which have been repeatedly decided and

(i) See in general 4 Bla. Com. 252, 253; Burn's J. Surety, Peace.

(k) See form of commission of peace, 4 Chitty's Crim. L.; and 3 Burn's J. 449, settled by Sir C. Wrey in 30 Eliz. Mic. T. 1590, and accepted and ordered to be used by the then chancellor.

(l) Dalt. J.; 5 Burn's J. Surety for good behaviour, 685.

(m) And see *Butt* v. *Conant*, 1 Brod. & B. 548, a case of a justice's warrant for a libel on Lord Ellenborough.

(n) Id. Ibid.; Dalt. c. 124; Hawk. b. 1, c. 73, s. 9; Cromp. 124, 125.

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acted upon as within the meaning of the acts and the authority of the commission. (*o*) It should seem, however, that when a person is bound by recognizance for *good behaviour*, he is not only to avoid actual breaches of the peace, but must well demean himself in his carriage and company, not doing any thing which might be a cause of a breach of the peace, or put the people in fear or dread, but this does not extend to misdoings of other things which touch not the *peace*. (*p*) A recognizance to keep the peace is only forfeited by an actual attack or threat of bodily harm, or burning a house; therefore it is not forfeited by bare words of heat and choler, as calling a man a knave, liar, rascal, or drunkard; for though such words might provoke a choleric man to break the peace, yet they do not directly challenge him to do it, nor does it appear that the speaker designed to carry his resentment further; and it has been said that even a recognizance for good behaviour shall not be forfeited by such words; (*q*) but a challenge to fight would undoubtedly constitute a breach of such recognizance. (*r*) However, a mere entry with force on lands, without offer of violence to any man's *person*, and without *public* terror, or a trespass to corn, or grass, or goods, or horse, so that it be not a taking from the person, though nominally breaches of the peace, are not sufficient to forfeit a recognizance to keep the peace, for the act to constitute a breach of such recognizance must be done or intended to the *person*, or in terror of the people. (*s*) But a recognizance to be of *good behaviour* shall not only be forfeited by *actual* breaches of the peace, but also for some others for which a recognizance to keep the peace would not be forfeited, as for going armed with great numbers to the terror of the people, as speaking words tending to sedition, and also as said in Hawkins, for such actual misbehaviour which are *intended* to be prevented by such a recognizance, but not for barely giving cause of suspicion for what

(*o*) 5 Burn's J. tit. Surety, &c. 686, 687. There seems no occasion to strain or extend the terms " *be not of good fame*," in the statute 34 Ed. 3, c. 1, to fresh cases, since by the modern act against *vagrants*, 5 Geo. 4, c. 83, *ante*, 621, 622, almost every possible description of person likely to commit offences is included, and they are made punishable, though perhaps in many of these cases it might suffice to require from such suspicious persons sureties for their good behaviour instead of the punishment at present prescribed, or at least so as to mitigate the punishment, now imprisonment for three or six calendar months, or a year. It seems very questionable whether a justice, in case of poisoning a neighbour's fowls, had any jurisdiction to require sureties for *good* behaviour under the 34 Ed. 3, c. 1, which seems only to extend to offenders therein mentioned, 5 Burn's J. Sureties, Good Behaviour, 683.

(*p*) Dalt. c. 122; Hawk. b. 1, c. 61, s. 5, 6.

(*q*) Hawk. b. 1, c. 60, s. 22.

(*r*) Id. sect. 21.

(*s*) Dalt. c. 121; 5 Burn's J. Surety, Peace, 678.

perhaps may never actually happen. (t) The term "intended," however, seems too undefined, for as the terms of the recognizance are in general to be of *good behaviour*, what those words mean must be considered to be confined to what the law considers good behaviour and its breaches, and not what the magistrate or others also required the recognizance intended to prevent.

It appears, however, to be agreed, that no legal assault or other act will constitute a breach of either recognizance if it were justifiable as a battery in self defence, or of a wife, child, apprentice, or servant. (u)

When and how to proceed before a justice, &c.

To obtain sureties to keep the peace, the party requiring it must swear to fear of present or future danger, and not merely to a battery or trespass, or any breach of the peace that is *past*, excepting indeed that it is always advisable to state any such injury and a threat of repetition, as a legitimate ground for fearing *future* injury, which fear must always be stated. (x) Whenever a person can swear to just cause of fear that another *will* burn his house, or do him corporeal hurt, as by killing or beating him, or causing others to do him such mischief, or illegally to imprison him; he may require sureties of the peace, and the justice is bound to cause proceedings accordingly, (y) or would be liable to an action and punishment for the consequences of his neglect; and a husband or parent may require such sureties against threatened injury to his wife or child. (z) But not a master in respect of threats to his servant, (a) nor any one by virtue of the general act for threats of injury to cattle, goods, or land. (b) Threats by letter or writing to burn or destroy houses, outhouses, barns, stacks of corn, or grain, hay, or straw, and other threats; are provided for by particular statutes. (c)

The oath and articles should state the connection, if any, between the parties, and the circumstance relating to any prior cruelty and injury to the *person*, and the threat, if any, of repetition, and then particularly state the existing fear of future *bodily* harm, or of his house being fired, and then conclude by swearing that the application is really and truly made from fear of bodily harm, and for protection against it, and not

(t) Hawk. b. 1, c. 61, s. 6.
(u) Hawk. b. 1, c. 60, s. 23, 24; Burn's J. Surety, Peace, IX.
(x) Dalt. c. 11, s. 116; Burn's J. Surety, Peace, I.
(y) Hawk. b. 1, c. 60, s. 6, 7.
(z) Dalt. c. 116.
(a) Id. ibid.
(b) Lamb. 83; Dalt. c. 116.
(c) 4 Geo. 4, c. 54, s. 3; 7 & 8 Geo. 4, c. 29, *ante*, 136; and see Burn's J. Threats.

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through hatred, malice, or ill will towards the other party. (*d*) But it should seem that if the facts of beating or ill usage and threat of repetition be true, and the apprehension of bodily harm be well founded, even ill will or express malice towards the party applied against will not constitute any ground for refusing sureties of the peace to prevent the commission of the expected injury. (*d*) Some of the forms of oath state in the *alternative*, that the party has beaten, *or* threatened to beat, the complainant, (*e*) but this is incorrect, and if actual injury and threat of further injury have taken place, both should be stated distinctly, and not in the alternative.

In general the application should be made to a neighbouring magistrate, or in case the sessions of peace are then holden, then directly to the court of sessions, unless in cases of Peers. (*f*)

The *Articles* before magistrates at sessions should be upon *oath*, or the affirmation of a quaker, (*g*) stating fully all the facts, and it is said that they should be exhibited on *parchment;* (*h*) but this, though usual, does not appear to be enjoined by any act of parliament, nor absolutely requisite, for immediate security may be requisite, and no parchment at hand. (*i*) The justices or Court of Sessions are then to issue a *Warrant* to bring the party charged before them. The *Recognizance* to be taken by a justice may be to keep the peace for a certain time, as for two years, or generally for any indefinite time, (*k*) though it is usually until the next sessions of the peace, and in the meantime to keep the peace to the king and all his liege people, especially to the party claiming the security, (*l*) and in the latter case the applicant should appear at the sessions and exhibit articles. (*m*) The former recognizance, however, seems preferable in common cases, because it avoids the necessity for the trouble and expense of the appearance of the parties at the next sessions. If the party refuse to find the sureties, he is, by the terms of the justice's commission and the statute, to be committed. (*n*) But if so committed, then the warrant must express the cause thereof, and show on the face of it that it

(*d*) Hawk. b. 1, c. 60, s. 6; Dalt. c. 116; see forms, 5 Burn's J. 688 to 693.

(*e*) *Quære*, see Burn's J. tit. Surety, Peace, Articles, K. B.

(*f*) Hawk. b. 1, c. 60, s. 3; 4 Bla. Com. 253; *Rex* v. *Bowes*, 1 T. R. 700.

(*g*) 9 Geo. 4, c. 32.

(*h*) Burn's J. Surety, Peace, IV.

(*i*) A plea *puis darrein continuance* at Nisi Prius may be on *paper*, *Myers* v. *Taylor*, Ryan & M. C. N. P. 404.

(*k*) *Willes* v. *Bridger*, 2 B. & Ald. 278.

(*l*) Talfourd's Dick. Sess. 404.

(*m*) Id. ibid.; *Rex* v. *Bowes*, 1 T. R. 696.

(*n*) 2 Hale, 112; Dalt. c. 118; Burn's J. Surety, Peace.

was a good one. (*o*) The forms of the proceedings may resemble those in the notes. (*p*)

(*o*) 4 Bla. C. 256; Hawk. b. 1, c. 60.

Form of information before justice out of sessions to require surety of the peace or good behaviour.

(*p*) Be it remembered, that on, &c., *A. B.* of ——, in the said county of —— [gentleman], came personally before me, *J. K.*, one of his majesty's justices of the peace in and for the said county at ——, and on his oath informeth me that *C. D.*, of &c. [labourer], did, on &c., at &c., most violently and maliciously declare and threaten, &c., and did also on, &c. [here state the defendant's threats and acts; see a form *post*], and that from the above premises he this complainant is afraid that the said *C. D.* will do him some grievous bodily injury; and therefore prays that the said *C. D.* may be required to find sufficient sureties to keep the peace [*or*, to be of good behaviour, as may be required; see form, Burn's J. 26 ed. No. 6, page 690,] towards him this complainant; and this complainant also says, that he doth not make this complaint against nor require such sureties from the said *C. D.* from any hatred, malice, or ill will, but merely for the preservation of his life and person from injury.

Sworn before me, *A. B.*

J. K.

Form of commitment thereupon for refusing sureties to keep the peace.

To the constable of ——, in the county of ——, and also to the keeper of his majesty's gaol for the said county.

County of ——, to wit.

Whereas *A. B.* of ——, in the said county, hath this day made oath before me, one of his majesty's justices of the peace in and for the said county, that *C. D.* of ——, in the said county, did, on the 10th day of May last, at the parish of ——, in the said county, threaten to kill him the said *A. B.* by his the said *C. D.* running a pitch-fork through him the first opportunity when he caught him alone, and that from the above and other threats used by the said *C. D.* towards the said *A. B.* he the said *A. B.* is afraid that the said *C. D.* will do him some bodily injury, and therefore the said *A. B.* hath prayed that the said *C. D.* may be required to find sufficient sureties to keep the peace, and be of good behaviour towards him the said *A. B.* And whereas the said *C. D.* was this day brought before me to answer the said complaint, and I, the said justice, have ordered and adjudged, and do hereby order and adjudge, that the said *C. D.* shall enter into his own recognizance in the sum of 100*l.* with two sufficient sureties in the sum of 50*l.* each, to keep the peace and be of good behaviour towards his majesty and all his liege people, and particularly towards the said *A. B.* And insomuch as the said *C. D.* hath refused to enter into such recognizance, and to find sureties as aforesaid, I do hereby require and command you the said constable forthwith to convey the said *C. D.* to the common gaol of the said county, and to deliver him to the said keeper thereof, together with this warrant. And I do also require and command you the said keeper to receive the said *C. D.* into your custody in the said gaol, and him there safely to keep, unless he in the mean time enter into such recognizance with such sureties as aforesaid, to keep the peace in the manner and for the term above-mentioned. Herein fail not. Given under my hand and seal, the —— day of ——, one thousand eight hundred and thirty-three. *J. K.*, (L. S.)

Articles of peace exhibited at sessions Clerkenwell, Middlesex.*

Style of the sessions.

At the quarter [or general quarter] sessions of the peace of our lord the king, holden at the New Sessions-house on Clerkenwell Green, in and for the county of Middlesex, by adjournment, on Monday the first day of May, in the third year of the reign of our sovereign lord William the Fourth, king of the united kingdom of Great Britain and Ireland, before *W. M.*, *J. P.*, *W. D.*, *E. F.*, esqrs., and others their fellows, justices of our said lord the king, assigned to keep the peace of our said lord the king in and for the said county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdeeds, committed in the same county.

Middlesex: Articles of the peace exhibited by *W. P.*, of Guildford-street, in the parish of St. Pancras, in the said county of Middlesex, gentleman, on behalf of himself and Hannah his wife, she the said Hannah being now confined through sickness in this exhibitant's dwelling-house, situate as aforesaid, against *J. M.*, late of ——, in the said county, shoemaker, in order to preserve the lives and persons of himself, this exhibitant, and the said Hannah his wife from bodily harm.

First, this exhibitant upon his oath saith, &c. [Here state the subject matter of the complaint and causes of fear, which may be as in the form *post*, 680.]

This exhibitant on his oath saith, that the said *H. P.*, this exhibitant's said wife, is now so ill and weak that she cannot be removed from her home to attend this

* See a form 5 Burn's J. 26 ed. 691.

CHAP. VIII. Prevention of Injuries

If the party required to find sureties be a Peer, (q) or if it be sworn that the local magistrates have improperly refused to

honourable court, to join in exhibiting this complaint, and that he this exhibitant, by means of the premises aforesaid, conceives and verily believes himself and his said wife to be in great bodily danger: and he further saith, that he doth not make this complaint against the said *J. M.* through any hatred, malice, or ill will, which he hath or beareth towards the said *J. M.*, but merely for the preservation as well of the life of his said wife as of his own, and also of their persons from bodily harm. Sworn at the New Sessions-house on Clerkenwell Green, this 1st day of May, 1833.

By the Court. *W. P.*

Form of stating the threats, &c.

First, This exhibitant upon his oath saith, that the above-named *C. D.* hath at several times abused him in a very gross and scandalous manner, by threatening to destroy him if he did not give him money.

Secondly, This exhibitant further saith, on —— last, the said *C. D.* abused him in a violent manner in his own house, and shook at this exhibitant a large stick in a threatening manner, and as if he was about to beat this exhibitant, and uttered violent oaths and imprecations, and said that he would not quit him until he had got five guineas from him, and likewise threatened to him, this exhibitant, mischief, if he did not by some means or other get it for him: that this exhibitant being apprehensive of his family being hurt from his threats, went out with him to his sister's, and in the way there he cursed him this exhibitant, and with great violence struck his stick against the ground and broke it into pieces, to the great terror of him this exhibitant; and this exhibitant saith, that from the violent oaths and threats of the said *C. D.* to him, he was induced and obliged to sign a note for 5*l.* payable to Mrs. *A. D.*, his sister, to get released from him, and he was apprehensive that the said *C. D.*, from his great passion, would destroy him, if he did not sign that note.

Thirdly, This exhibitant further saith, that on, &c. the said *C. D.* came again to this exhibitant's house, and, in a most violent and terrible manner, and with very many horrid oaths and imprecations, threatened this exhibitant's life, by saying he would be revenged of him, and would pull down and fire the whole house if he did not give him more money, and bid him this exhibitant fail at his peril.

Fourthly, This exhibitant further saith, that from the very many violent declarations made by the said *C. D.*, he this exhibitant is under great fear, dread, and apprehension of some violent mischief being done unto him by the said *C. D.*, and that by reason thereof he this exhibitant is obliged to keep within doors in order to prevent his putting his said threats into execution, and this exhibitant is in great danger of having his house set on fire and burnt by him the said *C. D.*, as he this exhibitant apprehends and verily believes.

Fifthly, This exhibitant further saith, that from the very many threats and declarations made by the said *C. D.*, and from the advanced age and weak state of health of this exhibitant, in consequence of his great fear, dread, and apprehension for his safety, he was at the time last aforesaid taken extremely ill, and hath continued so ever since, and been attended by a physician.

Lastly, This exhibitant saith, that he goeth in danger of his life, and of having his house set on fire from the said *C. D.*'s threats, and therefore he requireth sureties of the peace of the said *C. D.*, not through any malice, hatred, or ill will towards the said *C. D.* but merely for the preservation of his life, family, and property from danger.

Sworn, &c. *A. B.*

Articles of the peace exhibited at the quarter sessions by a wife against her husband.

Middlesex, to wit: Articles of the peace exhibited by *E.* the wife of *C. D.*, of the parish of ——, in the county of Middlesex, carver and gilder, against her husband the said *C. D.* at the general quarter sessions of the peace, held at the session's house on Clerkenwell-green, in and for the said county, on, &c.

First, This exhibitant upon her oath saith, that she was married to the said *C. D.* in the month of ——, A. D. ——, and that since her marriage the said *C. D.* has repeatedly abused and ill-treated her, without any provocation, and threatened her life, and that once in particular, not long before this exhibitant was brought to bed, the said *C. D.* said that, &c. [stating the threat.]

Secondly, This exhibitant further saith, that the said *C. D.* hath frequently kicked her this exhibitant, and otherwise ill-treated her, insomuch that she has been several times obliged to seek shelter with her child in her father's house, and had it not been for her parents she should have wanted for victuals and drink and the common necessaries of life.

(q) Hawk. b. 1, c. 60, s. 3; Burn's J. Sureties, Peace, III.

interfere, (r) or if the case be of sufficient importance as to be fit for the immediate interference of the Court of King's Bench, then the statute 21 Jac. 1, c. 8, regulates the proceeding, and enacts, that process of the peace or good behaviour shall not be granted either of the Court of Chancery or the King's Bench, but upon *motion* in open court, and declaration in writing and upon oath, to be exhibited by the party desiring such process, of the causes for which such process shall be granted; the motion and declaration to be indorsed on the back of the writ; and if it shall afterwards appear that the causes are untrue, the Court may order costs to the party grieved, and commit the applicant till paid.

The *Articles* in the King's Bench are to be framed substantially in the same terms as those at sessions, and must particularly state the past as well as future personal danger, and other circumstances. (s) The form is usually as in the note. (s) The articles

Thirdly, This exhibitant further saith, that on the 25th day of October last, as she the exhibitant and the said *C. D.* were coming home in a coach, the said *C. D.* grossly abused this exhibitant, and scratched her arms in a cruel manner, and that he struck her a violent blow on her face, which caused her nose to bleed and her eye to become blood-shotten, and that she suffered great pain therefrom for several days afterwards.

Fourthly, This exhibitant further saith, that on or about the —— day of —— last, the said *C. D.* threatened the life of this exhibitant and her child, and spat in the said exhibitant's face 30 or 40 times, saying that if she offered to cry out or make any the least alarm, he would run the carving tools in her body.

Lastly, This exhibitant saith, that she goeth in great danger of her life from the threats and ill treatment of the said *C. D.*, and therefore she requireth sureties of the peace of the said *C. D.*, not through any hatred or malice or ill-will towards the said *C. D.*, but merely for the preservation of her life from danger. *C. D.*

Form of articles of the peace used at the Surrey sessions, to be exhibited on parchment.

Surrey: At the general quarter sessions of the peace of our sovereign lord the king, holden at Guildford, in and for the county of Surrey, on ——, the —— day of ——, in the third year of the reign of king William the Fourth, *A. B.* of the parish of ——, in the county of ——, carpenter, prays security of the peace against *C. D.* of, &c. peelmaker, for fear of losing his life or receiving some bodily harm from the said *C. D.*

First, This exhibitant saith, that, &c. &c. [same in other respects as in the preceding forms.]

(r) *Rex* v. *Waite*, 2 Burr. 780.

(s) See requisites, 21 Jac. 1, c. 8, *ut supra*. Of Easter Term, in the third year of the reign of King William the Fourth, England.

Articles of the peace exhibited by a wife against her husband in the King's Bench.*

Articles of the peace exhibited by *E. B.* wife of *A. B.* of, &c. gentleman, against the said *A. B.* her husband, through fear of death or of receiving some great bodily harm.

First, This exhibitant on her oath saith, that she hath been married to the said *A. B.* for the space of six years and upwards, and that for the space of one year and ten months before the 1st day of November last past, the said *A. B.* hath treated this exhibitant with great cruelty and barbarity, and without any provocation whatever from this exhibitant, and in particular hath frequently during the time last aforesaid, struck and threatened to strike this exhibitant, and dragged her about his dwelling-house.

Secondly, This exhibitant on her oath saith, that the said *A. B.* having made a voyage to the East Indies, returned on or about the, &c. and soon after his return commenced or renewed an acquaintance with a woman who was known by the name of *E.*, with whom, as well as with other women, the said *A. B.* frequently cohabited, as this exhibitant hath great reason to believe, this exhibitant having known the said woman

* See proceedings before the Chancellor, *Tunnecliffe's case*, 1 Jac. & W. 348, *post*, 683.

must, by the terms of the above act, be verified by the oath of the exhibitant, (*t*) or by affirmation of a quaker. (*u*) This oath or affirmation should not be entitled with any names, though affidavits in answer must be so entitled. (*x*) In general it is advisable to have corroborative affidavits, but no affidavit in contradiction of the facts respecting the battery or injury, and threat of repetition, are to be received, as they are to be taken to be true until negatived through the medium of an appropriate prosecution; (*y*) but an explanation of ambiguous parts of the exhibitant's affidavits may be received; (*z*) and it should seem that affidavits showing direct evidence of express malice on the part of the applicant, such as a declaration to that effect, though not of inferred malice collected from general reasoning or collateral circumstances, may be received. (*a*)

The Court of King's Bench may require a *Recognizance* with sureties to keep the peace for any term of years (and which they may afterwards reduce (*b*)) or generally, in which case it

called by the name of *E.* shut into the said *A. B.*'s bed-room, where she hath remained with him several hours. And this exhibitant saith, that the said *A. B.* compelled this exhibitant to reside in mean lodgings, different from his place of residence, and that whenever this exhibitant ventured to go to the said *A. B.*'s chambers to expostulate with him on his ill treatment, he hath beaten or threatened to beat this exhibitant; and this exhibitant saith, that at one time in particular, during the time last aforesaid, the said *A. B.* did with a violent blow knock this exhibitant down in the said chambers, and that this exhibitant, in consequence of the said blow, lay senseless for a considerable time.

Thirdly, This exhibitant on her oath saith, that by means of the cruel treatment of the said *A. B.* before set forth, and particularly of his having at divers times within the space of three months last past, as this exhibitant hath been informed and believes, threatened to seize, confine, beat, maim or ill treat this exhibitant; she, this exhibitant, is put into the utmost fear and danger, and verily believes that the said *A. B.* will put his said threats into execution, and will do this exhibitant some bodily hurt, and therefore this exhibitant is prevented from going out upon her lawful occasions until she can obtain that protection from the laws of this country which this honourable court has authority to grant. And this exhibitant further saith, that she is now under great fear and apprehension that the said *A. B.* will take the first opportunity of doing this exhibitant some bodily hurt, unless he is restrained therefrom by this honourable court, and therefore this exhibitant most humbly craves that the said *A. B.* may be ordered by this honourable court to find sufficient sureties for keeping the king's peace towards this exhibitant.

Lastly, This exhibitant saith, that she doth not make this complaint against the said *A. B.* through any hatred, malice or ill will which she hath or beareth towards him, but merely for the preservation of her life, and also of her person from bodily harm.

E. B.

The above-named *E. B.* was sworn to the truth of the above premises, on Saturday next after ——, in the third year of the reign of King William the Fourth.

By the Court.

(*t*) *Rex* v. *Green*, 1 Stra. 527; 2 Mod. 243.

(*u*) 9 Geo. 4, c. 32.

(*x*) *Rex* v. *Lewis*, 1 Stra. 704; *Bevan* v. *Bevan*, 3 T. R. 601; *King* v. *Cole*, 6 T. R. 642.

(*y*) Dick. Sess. 504; see *Lord Vane's case*, 13 East, 171; *Sutton* v. *Johnstone*, 1 T. R. 504; *Rex* v. *Parnell*, 2 Burr. 806; 3 Burr. 1932.

(*z*) *Rex* v. *Doherty*, 13 East, 174, note.

(*a*) Dick. Sess. 504; *Lord Vane's case*, 13 East, 171.

(*b*) *Rex* v. *Bowes*, 1 Term R. 700.

continues during life; (c) and where the party required to give the security is aged or ill, or at a distance, the court will authorize, and by mandamus command, local justices to take the recognizance specifying the form. (d)

By the Chancellor.

The *Chancellor* is by the common law a conservator of the peace, and may award precepts and take recognizance of the peace, (e) and upon *oath*, and proceedings regulated by the before-mentioned statute and *Supplicavit*, he is expressly authorized to require sureties of the peace. (f) But sureties in that court are not so frequent, unless when connected with some other pending proceeding; many instances of that proceeding are however to be found. (g) It is said that a supplicavit has often been granted by the court upon articles filed on oath by a wife of assault and battery, and that the party goes in fear of her life, (h) and a case of that nature has recently occurred. (i) But in some cases the writ has been refused, and the party directed to apply to justices of the peace. (k) To grant the writ the articles should not be in the general form as fearing, "being threatened," &c. but some fact must be shown on which the fear is grounded. (l) This court will only bind a husband for his good behaviour, and will not remove his wife from him; (m) and in this court, as at sessions and in the Court of King's Bench, the defendant will not be discharged on an affidavit contradicting the facts, without showing combination and contrivance; (n) but it is usual to discharge the defendant at the end of a year, unless repetition of personal injury appear. (o) With respect to the required sureties they have been some time reduced, (p) and the master has been directed not to be strict as to the abilities of the sureties. (q)

Articles on behalf of a wife.

It is principally on the part of a *wife* against cruelty and personal injury from a husband that articles of the peace are exhibited. (r) Where such an application is founded on good ground, it is considered so *necessary*, that an attorney employed

(c) Hawk. b. 1, c. 60, s. 15; *Willes* v. *Bridges*, 2 Bar. & Ald. 278.

(d) *Rex* v. *Bowmaster*, 1 Bla. R. 233; 2 Burr. 1039, S. C.; and *Rex* v. *Lewis*, 2 Stra. 835.

(e) 1 Mad. Ch. Prac. 2.

(f) Burn's J. Sureties, Peace, III. & VII.

(g) See 1 Mad. Ch. Pr. 11, and the cases there collected; 2 Chit. Eq. Dig. tit. Practice, xciii. 5, Writ of Supplicavit, 1160; Beame's Orders, 39, when and how to be granted.

(h) *Dobbin's case*, 3 Vesey & Bea. 182; *Tunnecliffe's case*, 1 Jac. & W. 348.

(i) *Tunnecliffe's case*, 1 Jac. & W. 348.

(k) *Clavering's case*, 2 P. W. 202; 1 Mad. Ch. Pr. 11; see forms, *Tunnecliffe's case*, 1 Jac. & W. 348.

(l) *Rex* v. *Brinlow*, 1 Mad. Ch. P. 11.

(m) *Ex parte King*, Ambl. 333; 2 Ves. 578.

(n) Id. ibid.

(o) *Baynum* v. *Baynum*, Amb. 63; *Ex parte Sir Richard Grosvenor*, 3 P. Wms. 103; Fitzg. 268.

(p) *Ex parte Sir R. Grosvenor*, 3 P. Wms. 113. As to the amount of the sureties in general, see *Tunnecliffe's case*, 1 Jac. & W. 348.

(q) *Ex parte King*, Ambl. 240; 1 Mad. Ch. Pr. 12.

(r) See instances, Burn's J. Surety, Peace, II.

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by the wife to institute such a proceeding against her husband, may even sue him for his fees and professional attendance as upon his retainer, and so strongly does the law imply his contract to pay, that it will not allow evidence to rebut the implication. (*s*) Generally speaking, when by a long course of cruelty on the part of the husband the possibility of the wife residing with him has become hopeless, a suit in the spiritual courts for a divorce and alimony seems the more permanent and preferable remedy. (*t*)

If the marriage be disputed, the court will order the recognizance to be worded so as not to admit the fact, and it was directed to be as follows:—To keep the peace towards our sovereign lord the king and all his liege people, and particularly towards *H. P.*, who hath exhibited articles of the peace against him the said *J. B.*, by the name of *H. B.*, wife of him the said *J.*, and that he shall not depart the court without leave, &c. (*u*)

Another mode by which a wife may obtain protection and indeed a divorce on account of the cruelty of her husband, is by proceeding in an ecclesiastical court, and which we will consider in the next volume. (*v*)

Summary relief from imprisonment by *Habeas Corpus*. (*x*)

When a party *continues imprisoned*, whether legally or illegally, he may (except in certain cases of the highest crimes,

(*s*) *Ante*, 60; *Shepherd* v. *Mackoul*, 3 Campb. 326; see a case in equity upon the same principle, where proceedings were sustained against the husband, *Harris* v. *Lee*, 1 P. Wms. 482; and *Williams* v. *Fowler*, 1 M'Clel. & Young, 269.

If a husband turn his wife out of doors, and it is necessary for her safety to exhibit articles of the peace against him, he is liable to an attorney employed by her for that purpose. Where a wife was indicted for keeping a disorderly house, which she had done with her husband's concurrence:—Held, that he was liable to an attorney, whom she employed to defend her, and by whom he knew that she was defended.

Lord Ellenborough.—The defendant's liability for the first part of the charge will depend upon the necessity for exhibiting articles of the peace against him. If that proceeding was uncalled for, his wife certainly could not make him liable for the expense thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband for the necessary expense of this proceeding as much as for necessary food. With respect to the defence upon the indictment, as the defendant knew and approved of the business his wife carried on, and was aware of the prosecution, without expressing any dissent to the plaintiff's defending her, I think a promise may be *fairly* inferred on the part of the defendant to pay the plaintiff for his labour in conducting the defence.

The plaintiff had a verdict for his whole demand.

Garrow, S. G. and Reader for plaintiff; Topping for defendant. *Shepherd* v. *Mackoul, supra.*

Whenever the husband causelessly turns away his wife, he is liable for necessaries supplied to her; *Thompson* v. *Harvey*, 4 Burr. 2177. *Aliter*, if he do so for just cause; *Ham* v. *Toovey*, Selwyn, N. P. 2d. edit. 290.

(*t*) *Legardo* v. *Johnson*, 3 Ves. jun. 352.

(*u*) *Rex* v. *Bambridge*, 2 Str. 1231.

(*v*) See also *ante*, 59.

(*x*) See in general Com. Dig. Bac. Ab.; Burn, J. title Habeas Corpus; 1 Chit. Cr. L. 118 to 132; Id. 2d edit. 129; 3 Bla. C. 129 to 139, and notes; *Crowley's case*, 2 Swanst. 56, &c.; Tidd, 9th edit. 287—347; *The King* v. ——, 2 Chit. R. 110; *Rex* v. *Show*, 6 Dowl. & R. 154; Petersd. part iii. ch. iii.

as *treason* or *capital felony*, which are not bailable,) obtain an investigation of the cause of imprisonment by issuing a writ of habeas corpus, returnable immediately before the Chancellor or one of the superior courts, usually in criminal cases the Court of King's Bench in *term time*, or now before one of the judges or barons *in vacation*, and who will thereupon, if the imprisonment were wholly illegal, immediately discharge him, or when legal, unless in the excepted cases, bail him on his finding adequate sureties to be forthcoming at a future time to receive his trial for the supposed offence. (*y*) Lord Coke and Lord Hale say, "By virtue of the statute of Magna Charta, and indeed by the *common law*, an habeas corpus in *criminal* cases may issue out of the *Chancery* at all times of the year, even in the *vacation;* but that at common law neither the King's Bench nor Common Pleas could grant that writ but in *term time*." (*z*) The Habeas Corpus Act, 31 Car. 2, c. 2, was therefore passed to enable and require any judge or baron in *vacation*, in case of imprisonment for any *criminal* or supposed criminal matter, excepting cases of treason or felony *plainly* and specially expressed in the warrant of commitment, to issue the writ as therein mentioned. (*a*) It has been observed that that statute was designed not so much to confer *new rights* on the subject as to provide *new remedies* for ancient rights and to extend the previously existing common law power of the *Chancellor* to issue an habeas in *criminal* cases in the *vacation*, to the *judges* and *barons*.(*b*) But as that statute only applied to imprisonments for supposed *crime*, it was found necessary, by 56 Geo. 3, c. 100,(*c*) to extend the power of issuing an habeas corpus in vacation to other cases of imprisonment and to all imprisonments, excepting for supposed crime and imprisonments for debt or by process, *i. e. lawful* process in any *civil suit*, and which any judge (*d*) or baron of the superior courts is required by that act to issue in *vacation*, "upon complaint made by or on the behalf of the party confined or restrained, *if it shall appear by affidavit or affirmation that there is a probable and reasonable ground for such complaint*." These statutes only extend the *common law*

(*y*) See *ante*, 684, note (*x*).

(*z*) Co. Lit. 81, 182; 2 Hale, P. C. 147; *Crowley's case*, 2 Swanst. 1, 48; Buck, 264, S. C.; where see a clear exposition of the Habeas Corpus Act, 31 Car. 2, c. 2. The Chancellor now seldom exercises his jurisdiction under the 31 Car. 2, c. 2; 2 Mad. Ch. Pr. 711. See observation as to whether the Chancellor has jurisdiction by habeas out of term, *Lyons v. Blenkin*, 1 Jacob's R. 254.

(*a*) See the Habeas Corpus Acts, Chit. Col. Stat. tit. False Imprisonment, 340 to 349.

(*b*) *Crowley's case*, 2 Swanst. 8.

(*c*) See that act, Chit. Col. Stat. 347, 348.

(*d*) It will be observed that this act does not name the Chancellor.

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power of the court in term time to each judge in vacation, and it is still necessary to refer to the common law jurisdiction, which, in all cases not expressly provided for by the acts, is impliedly extended to and regulates the proceeding; and, therefore, though the statute, 31 Car. 2, c, 2, is silent as to any affidavit, it seems *that the party* applying *for the writ* must, in all cases, *show to the judge by affidavit a probable and reasonable ground for issuing the writ.* (e) The statutes, however, add important regulations and impose heavy penalties for disobedience of those regulations, and if a judge wrongfully refuse the writ when he ought to grant it, he incurs the penalty of 500*l.* and costs, even if his denial proceeded on the most honest doubt. (*f*)

The 31 Car. 2, c. 2, requires that the writ shall be *obeyed* immediately. It enacts, that any person committed or detained for any *crime*, unless for felony or treason *plainly* expressed in the warrant of commitment, or any one on his behalf, may in vacation time complain to the Chancellor or lord keeper, or any one of his majesty's justices of King's Bench or Common Pleas, or barons of Exchequer, and who, upon view of the copy of the warrant of commitment, or upon oath that it has been denied, is authorized *and required,* upon request *made in writing* by such person or any on his behalf, attested and subscribed by two witnesses who were present at the delivery of the same, (*g*) to award and grant an habeas corpus to the delivering officer returnable immediately, and who is to return the same within the time prescribed, and the judge within two days after the party has been brought before him, is to discharge the prisoner, taking his recognizance with sureties for his appearance in the proper court, unless it shall appear that the prisoner has been imprisoned on legal process, order or warrant for a matter or offence not bailable.

The 56 Geo. 3, c. 100, reciting that the above-mentioned act is confined to imprisonments for supposed *crime,* extends the power of issuing a writ of habeas corpus in vacation, and enacts, that where any person shall be confined or restrained of his liberty, otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process, (*i. e.* legal process,) in any civil suit, any judge or

(e) See *post*, 691; and see *Hobhouse's case*, 2 Chit. R. 207; Tidd, 9th edit. 347.

(*f*) *Crowley's case*, 2 Swanst. 11, 12; *Ward* v. *Snell*, 1 Hen. Bla. 10. The 500*l.* penalty only applies to the refusal of a writ of habeas corpus in the *vacation*, and not to a refusal in term time, Hawk. b. 2, c. 15, s. 24.

(*g*) The form of *Request* as required by 31 Car. 2, c. 2, s. 3, may be as *post*, 691.

baron is *thereby required*, "upon complaint made to him by the party so confined or restrained on his behalf, if it shall appear by affidavit or affirmation that there is probable and reasonable ground for such complaint, to award in *vacation time* a writ of *habeas corpus ad subjiciendum*, returnable immediately;" and that although the return to the writ should be sufficient, it shall be lawful for the judge or baron to examine into the truth of the facts set forth in such return by affidavit or affirmation, *and to do therein as to justice shall appertain*; (*h*) and if the propriety of the imprisonment shall appear doubtful, he may in vacation refer the matter to the court in the next term, and take bail in the mean time; but the court in term time, or a judge in vacation, should, in case the imprisonment were *manifestly illegal*, *discharge* the party or bail him. (*i*) If the party have omitted to apply for two whole terms, then he is not entitled to an habeas corpus returnable in vacation; (*j*) then the acts contain regulations compelling expeditious proceeding to trial in cases where the party is legally imprisoned.

But the writ of habeas corpus does not issue as a matter of course upon application in the first instance, whether the application be at common law or on the statute 31 Car. 2, c. 2, but must be grounded *on affidavit of a probable reasonable ground for the complaint*, and that it is made *by or on the behalf of the person imprisoned*; (*k*) and upon such affidavit the court are to exercise their discretion whether the writ shall or shall not issue. (*l*) A commitment of a lunatic or by the house of commons for a contempt, is not for a *crime* within the 31 Car. 2, c. 2; (*l*) and it has been doubted whether a commitment by a justice of the peace on *conviction* in a penalty under the excise laws, is for a crime within the meaning of that act. (*m*) By the 7 Geo. 4, c. 48, s. 17, no writ of habeas corpus is to be granted for prisoners for offences against smuggling and the customs, unless the *objection* to the proceedings be stated in the affi-

(*h*) 56 Geo. 3, c. 100, s. 3; *Ex parte Beeching*, 6 Dowl. & R. 200; 4 Bar. & Cres. 136, S. C. *Aliter*, in cases strictly criminal, when it is said the truth of the return cannot be controverted, Hawk. P. C. 113; 2 Burn's J. 26th edit. 1085.

(*i*) 31 Car. 2, c. 2, s. 3; 56 Geo. 3, c. 100, s. 3.

(*j*) Id. ibid. sect. 4.

(*k*) *Hobhouse's case*, 3 Bar. & Ald. 420; 2 Chit. R. 207, S. C.; 1 Chit. Crim. L. 124; see form of affidavit, Hand's Prac. 519; 4 Chit. Crim. L. 121.

(*l*) *Rex* v. *Hobhouse*, 3 Bar. & Ald. 420; 2 Chit. R. 207, S. C.; *Bushel's case*, 2 Jones, 13; 3 Bla. C. 132; Fortes. 140; Hand's Prac. 73; Tidd, Prac. 9th edit. 347; 1 Chit. Crim. L. 124. The 31 Car. 2, c. 2, s. 3 & 10, do not require any such oath or any proof, and therefore the necessity for it is implied by the previous *common law practice*, and for the reason stated in 3 Bla. Com. 132. The 56 Geo. 3, c. 100, s. 1, expressly requires such an affidavit where the confinement is *not* for a supposed crime.

(*m*) *Huntly* v. *Lascombe*, 2 B. & P. 530.

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davit. (n) When the application is to induce the court to bail the party, on the ground that the supposed murder or felony was merely manslaughter or no crime whatever, the application should be supported by other affidavits than the prisoner's; (o) so if committed under a rule of the court of King's Bench. (p)

If it appear as well from the return as from the accompanying depositions and proceedings, that *no offence whatever* has been committed and that there is no ground for the imprisonment, it should seem that the court would at once discharge the party without requiring *any* bail. (q) So if there has been delay of prosecution of a criminal case beyond the time mentioned in the act, the court will, in general, immediately after discharge the prisoner on bail; (r) but not if the trial was delayed on account of the absence of the prisoner's witnesses. (s) If a *corpus delicti* appear in the depositions, the court will remand the prisoner upon a special rule or bail him, although the warrant of commitment be informal. (t) If an offence be clearly charged, either by the warrant or the deposition, then the party will be bailed if the offence be bailable; (u) and it is said, that if there be *no warrant* of commitment whatever showing the crime, bail will be invariably accepted however great the crime may, from the depositions, appear to have been, because an offender should always be carried before a justice of the peace before he be committed. (x) But, in general, when a party is liable to be detained on a criminal charge, the court will not inquire into the manner in which the caption was effected; (y) and in a recent case, where a party, against whom a true bill for perjury had been found, and the chief justice's warrant for her apprehension had been granted, and she was illegally apprehended on the continent and illegally brought into England in custody, and then carried under the warrant before the chief justice, and committed by him to

(n) 2 Burn's J., Excise, 205, 222 and 1083.

(o) *Rex* v. *Franklin*, Cald. 246; 1 Leach, 255, S. C.

(p) *Burdett* v. *Abbott*, 5 Dow's Rep. 199.

(q) *Burdett* v. *Abbott*, 14 East, 82; Id. 94, 95; *Rex* v. *Duggar*, 5 B. & Ald. 791; *Ex parte Hill*, 3 Car. & P. 225. The 31 Car. 2, c. 2, s. 3, seems to suppose that bail are always to be required on discharging the party out of custody; but the 56 Geo. 3, c. 100, s. 3, relating to imprisonments *not for crime*, supposes that the court may *discharge* the party without bail.

(r) *Rex* v. *Wyndham*, 1 Stra. 4; see 31 Car. 2, c. 2, s. 7; *Anon.* 1 Ventr. 316.

(s) *Blake's case*, 2 M. & S. 428.

(t) *Rex* v. *Marks*, 3 East, 162; *Ex parte Kraus*, 1 B. & Cres. 262; Com. Dig. Bail, F. 1 to 10.

(u) *Baynum* v. *Baynum*, Amb. 64; *Rex* v. *Lord Delamere*, Comb. 6.

(x) *Rex* v. *Wilkes*, 2 Wils. 158; *Bethell's case*, 1 Salk. 347; *sed quære*, and see next note (y), and cases, and as the judges of King's Bench are *virtuti officii* also justices of the peace, why should not they commit for the crime clearly before them?

(y) *Rex* v. *Marks*, 3 East, 157; *Ex parte Kraus*, 1 Bar. & Cres. 258.

prison for want of bail, the court refused to discharge her on habeas corpus, on the ground that she had been improperly apprehended in a foreign country, for which she might recover compensation by action. (z) When, however, a person is entitled to the writ on the ground that he has been illegally committed by a magistrate, the judge will not impose the terms that the party shall not bring an action against such magistrate. (*a*)

By whom, or on whose behalf an habeas corpus may be obtained.

It will be observed, that both the acts 31 Car. 2, c. 2, s. 3, and 56 Geo. 3, c. 100, s. 1, require that the application for an habeas corpus under either of those acts be made by or on *the behalf of the person committed or detained, confined or restrained*, and upon *his written request* attested by two witnesses; and therefore, in general, a stranger cannot apply, and it must appear that the party imprisoned himself requires the writ. (*b*)

An alien enemy cannot have this writ, the relief being in that case by application to the secretary at war; (*c*) but, in general, any other alien may have this writ, if restrained of his liberty. (*d*) We have seen that a person committed for a contempt by the House of Lords or Commons is not within that act; (*e*) nor, as has been said, a person committed by rule of court. (*f*) But in general, any person illegally imprisoned, even in a mad-house, may by this writ obtain his release. (*g*) If it be doubtful whether a person is confined against her inclination, the court will order a proper private examination, (*h*) and where a seaman improperly impressed, before the two years of his imprisonment had expired, applied for his discharge within the time, but on insufficient affidavits, the court, although after the expiration of the time, upon proper affidavits, discharged him. (*i*)

A married woman may, when there are articles of separation between her and her husband, and she be afterwards confined by him, recover her liberty by this writ, made upon her own application; but the affidavit must show that the application is at her instance, (*k*) and unless that expressly appear the courts

(z) *Ex parte Scott*, 9 Bar. & Cres. 446.
(*a*) *Ex parte Hill*, 3 Car. & P. 225.
(*b*) *Rex* v. *Wiseman*, 2 Smith's R. 617; *Ex parte Lansdown*, 8 East, 38. See form of request, *post*, 691.
(*c*) *Anon.* 2 Bla. R. 1324; *Rex* v. *Schiever*, 2 Burr. 765.
(*d*) *Hottentot Venus's case*, 3 East. 195.
(*e*) *Burdett* v. *Abbott*, 14 East, 1.
(*f*) *Rex* v. *Flower*, 8 T. R. 324; Bac. Ab. Hab. Corp. B. 4; Com. Dig. Hab. Corp. C.; *Burdett* v. *Abbott*, 5 Dow's R. 199.
(*g*) *Rex* v. *Tarlington*, 2 Burr. 1115. We have seen that if committed by a justice under the 39 & 40 Geo. 3, he might be bailed by a judge, *ante*, 670, 671.
(*h*) *Hottentot Venus's case*, 3 East, 195.
(*i*) *Ex parte Bruce*, 8 East, 27.
(*k*) *Lady Vane's case*, 13 East, 173, and *semble*, now articles of separation are void, *ante*, 58; but see qualification, *Wilson* v. *Mushett*, 3 Bar. and Adolp. 743.

will not interfere. (*l*) And it has even been held, that if a husband apply for an habeas corpus to bring up his wife, his affidavit must state, that she is detained against her will; (*m*) and the wife could not, when the ancient writ *de homine replegiando* was in use, have it against her husband. (*n*)

But if it should be sworn by a third person that a married woman is so closely confined and ill-treated by her husband as to preclude all access to her, or that she is too weak in body and mind to obtain an affidavit from her, and that she is suffering in health, and in danger of her life, it is probable the court would order that a physician, apothecary, and other proper persons should have access to her. (*o*)

In the case of an *Infant Child*, the father may have this writ in the first instance, upon his own affidavit that his child has absconded without his consent, and that ineffectual attempts to retake him from the custody of a third person, who wrongfully harboured him, had been made, and without any affidavit on the part of the child that he was detained against his will: (*p*) A child, however, who wishes to return to her parents, may, on her own application, have this writ, as every individual might. (*q*) And he may have this writ in case of cruel or personal ill usage from his parent, though in general, if he have property, then it is better to make him a ward in Chancery, where his interests can be better protected than at law. (*r*)

But in the case of *Infant Apprentices*, there must be an affidavit that he is detained against *his* will, and the court will not issue the writ on the mere application of the master; (*s*)

(*l*) *Rex* v. *Middleton*, 1 Chit. R. 654; *Middleton* v. *Middleton*, 1 Jac. & W. 94.

(*m*) *Rex* v. *Wiseman*, 2 Smith's R. 617.

(*n*) *Attwood* v. *Attwood*, Pre. Ch. 492; 1 Mad. Ch. P. 21.

(*o*) *Rex* v. *Wright*, 2 Burr. 1099; but see *Rex* v. *Middleton*, 1 Chit. R. 654, and *Middleton* v. *Middleton*, 1 Jac. & Walk. 94, *ante*, 60.

(*p*) *In re Pearson*, 4 Moore, 366; *Rex* v. *Hopkins*, 7 East, 579.

(*q*) *Rex* v. *Clerke*, 1 Burr. 606.

(*r*) *Lyons* v. *Blenkin*, 1 Jacob's R. 254, *ante*, 64, 65, 69.

(*s*) *Rex* v. *Reynolds*, 6 Term Rep. 497. If an apprentice, aged 18, voluntarily enter into the sea service, his master is not entitled to a habeas corpus to bring him up.

Lord Kenyon C. J.—"The writ ought not to be issued at the instance of the master, but the apprentice, who is of sufficient age to judge for himself, should have applied for it, if he had wished it. By comparing the different clauses of the act of Anne together, it appears that the apprentice, if under 18 years of age, ought not to be impressed into the king's service; but, according to the 17th section, the master is entitled to the wages earned by his apprentice after the age of 18. Suppose this apprentice had been taken into the service *of any other master, we should not have granted an habeas corpus at the instance of his first master, but should have left him to his action for seducing his apprentice*: then, as far as respects the question before the court, it is immaterial whether the apprentice be now in the king's service, or in that of any other master."

Rex v. *Edwards*, 7 T. R. 745. One Gabriel, an apprentice, having entered into the sea service and received the bounty money, the master moved for an habeas to bring him up in order that he might be restored to him; then

Percival obtained a rule to show cause

though it should seem that the chief justice may, at the instance of the master, issue his warrant to bring up his impressed apprentice, without any assent on the part of the latter. (*t*) If it should appear by the return that the apprentice was legally committed for running away, he will be remanded. (*u*)

Practical proceeding in obtaining a writ of habeas corpus.

When a party considers himself to be illegally imprisoned, or that he is entitled to be released out of custody on finding bail, if he be imprisoned on a charge of *crime*, or even *supposed* crime, the statute 31 Car. 2, c. 2, s. 3, expressly requires that when the application is made in the vacation, the judge applied to shall have view of the *copy of the warrant of commitment* and detainer, or an oath that such copy was denied to be given to the party imprisoned, and there must be a *Request in writing* by the party imprisoned, or some one on his behalf, attested and subscribed by two witnesses, who were present at the delivery of the same, (*x*) and thereupon the judge is to issue the

why the writ should not be quashed *quia improvidè emanavit*, on the ground that this application was made by the master, and not by the apprentice, and he relied on the case of *Rex* v. *Reynolds*, 6 Term Rep. 497.

Erskine, *contrà*, contended that no apprentice could be impressed either in the army or navy; that it was even part of the oath taken by a soldier on enlisting, that he was not an apprentice; and that if the apprentice were improperly detained, the court ought to grant a habeas, either at the instance of the master or the apprentice.

But the court said, that the distinction was properly taken in the case cited, that though the apprentice might obtain the writ the master could not, for that *its object was the protection of the liberty of the party*. That the master was not without a remedy, for that he might have his action against those who detained the apprentice, after knowing him to be an apprentice. But they added, that the Lord Chief Justice had the power, under an old statute passed in the reign of Henry 8, of granting warrants for the bringing up apprentices in this situation, and that Lord Mansfield had frequently exercised that power. And Lord Kenyon added, that though the Court would make this rule absolute, to quash the writ of habeas corpus, he should issue his warrant to bring Gabriel before him to be discharged, unless the Admiralty agreed to release him. Rule absolute.

Ex parte Lansdown, 5 East, 38. Marryat moved for a writ of *habeas corpus* to bring up the body of J. Lansdown, an apprentice, (one who was protected from being impressed by the statute 13 Geo. 2, c. 17,) who had been impressed and taken on board one of the king's ships. But he stated that this application was made on behalf of the master, the apprentice himself being willing to enter into the king's service.

Lord Ellenborough, C. J.—" The writ of habeas corpus is for the protection of the personal liberty of the subject. If the party himself, being of competent years of discretion, do not complain, we cannot issue the writ on the prayer of the master, who has his remedy by action, if his apprentice have been improperly taken from him."

The other judges concurred, and observed that of late years similar applications had been repeatedly refused to be granted.

Rex v. *Middleton*, 1 Chit. R. 654, in 1 Burn's J. 176.

(*t*) *Rex* v. *Edwards*, 7 T. R. 745.

(*u*) *Ex parte Gill*, 7 East, 376.

(*x*) *Huntley* v. *Luscombe*, 2 Bos. & P. 530; *ante*, 686.

Form of written request to a judge to issue an habeas corpus.

My Lord, (or Sir,)

I do hereby respectfully request you immediately to peruse the copy of the warrant of commitment and detainer hereunto annexed, and under colour or pretence whereof I am now imprisoned in the gaol of ——, in the county of ——, and inasmuch as such imprisonment is unlawful, and I am entitled to be released or bailed from such imprisonment, I do hereby respectfully, in pursuance of the statutes in that case

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writ of habeas corpus returnable immediately. And we have seen that although the statute 31 Car. 2, c. 2, s. 3 & 10, does not in terms require any affidavit, yet in practice it is usual to produce *an affidavit or affidavits of the prisoner and third persons*, showing that there is reasonable cause for issuing the writ. (*y*)

Whenever the application is for a writ to relieve a party from imprisonment for an offence against smuggling and the customs, the affidavit must state the objections to the proceedings. (*z*)

When the imprisonment is *not* for an alleged crime, but on some other pretence, and the application is in the *vacation*, the 56 Geo. 3, c. 100, s. 3, expressly requires that the complaint shall be by or on the behalf of the person confined or restrained, and upon an affidavit or affirmation that there is a probable and reasonable ground for the complaint, and thereupon the writ is to be issued in vacation, and the court may afterwards in term discharge or bail or remand the party, and the truth of the return may be controverted by affidavit. (*a*)

In *term* time the *application* is made by the prisoner's counsel, founded upon the proper *affidavits;* in *vacation* by his attorney; and when the application is made to a judge at chambers, he grants his fiat, upon which the clerk in court makes out the habeas corpus and delivers it to the prisoner's attorney. (*b*) At the time of moving or applying for an habeas *corpus*, it is usual and proper also to apply for a *writ of certiorari* from the crown office to the committing magistrate, and requiring him to return the depositions taken before him, so that besides reading the commitment the court may be able to form an opinion upon the nature of the supposed offence and the probable guilt of the prisoner, and then discharge or bail him. (*c*)

made and provided, request you immediately, and in proper form, to award and grant an habeas corpus, returnable immediately, so that I may be removed and released from such imprisonment. Dated this —— day of ——, A. D. ——.

Signed and delivered by the said *A. B.* on this —— day of ——, A. D. ——, in our presence, and which we now attest. Signature, *A. B.*

E. F.
G. H.

(*y*) *Ante*, 687; *Rex* v. *Franklin*, Cald. 246; 1 Leach, 255; *Hobhouse's case*, 2 Chit. R. 207; 3 B. & Ald. 420, S. C.; Burn's J. Habeas Corpus, II. 1083. But see Hand's Prac. Forms; and 4 Chit. Cr. L. 519.

(*z*) 7 Geo. 4, c. 48, s. 17. See *Kite and Lane's case*, 1 Bar. & Cres. 101; *In re Nunn*, 8 Bar. & C. 644; *Deybel's case*, 4 B. & Ald. 243; *Nash's case*, 4 B. & Ald. 295; *Souden's case*, 4 B. & Ald. 294; *Rex* v. *Rogers*, 3 D. & R. 607.

(*a*) *Ex parte Beeching*, 4 Bar. & Cres. 136; 6 Dowl. & Ry. 209, S. C.; Tidd, 9 ed. 347.

(*b*) Burn's J. Habeas Corpus, II. 1085.

(*c*) *Rex* v. *Marks*, 3 East, 157; 2 Burn's J. 26 ed. 1085.

The *writ* of habeas corpus is general, without stating the grounds or reason for issuing the same. (*d*) It must not be in the disjunctive, as thus, "to the sheriff *or* gaoler,"(*e*) and should be directed to the officer in whose custody the prisoner is; (*f*) and it must be subscribed by the judge awarding it, or it need not, it is said, be obeyed. (*g*) With respect to the *service*, if the gaoler be accessible, the writ should be served upon him, otherwise on the deputy, but endeavours should be made to serve the writ on the principal. (*h*) The *return* may be enforced by *attachment*, even against a peer, or redress by action or indictment. (*i*) Such return will necessarily vary according to circumstances. (*k*)

In *criminal* cases it has been said that the return cannot be controverted, (*l*) but in offences which rather partake of a *civil* nature, as in case of imprisonment upon an information in the Exchequer for penalties for smuggling, &c. the truth may be denied; (*m*) and it seems that where a prisoner is brought up under an habeas corpus, issued at common law, he may controvert the truth of the return by virtue of the express enactment in 56 Geo. 3, c. 100, s. 4. (*m*)

Upon the return, the prisoner's counsel may move to file it, and to have the prisoner called into court, and the return, with the depositions, usually returned with the certiorari, read, and after which his counsel may argue for the prisoner's discharge. The judge before whom the prisoner is brought, is within two days to discharge him from imprisonment on proper sureties for his appearance, if the cause or charge be bailable, and if it be not, then he is to remand him. But the Court of King's Bench may *remand him*, and require him to be brought up *from time to time*, during a reasonable time, until they have come to a decision. (*n*)

The course formerly was to bring up the party into court in all cases, however great the distance, but of late, where the court thinks fit, upon hearing affidavits of poverty or inability to travel, they will grant a rule to show cause, and decide upon

(*d*) 1 Chit. Crim. L. 125, 126; see form, 4 Chit. Crim. L. 121.

(*e*) *Rex* v. *Fowler*, 1 Salk. 350.

(*f*) Godb. 44; Bac. Ab. Hab. Corp.

(*g*) *Rex* v. *Roddam*, Cowp. 672.

(*h*) *Huntley* v. *Luscombe*, 2 Bos. & P. 530.

(*i*) *Rex* v. *Winton*, 5 T. R. 89; *Anon.* Salk. 349; *Ex parte Bosen*, 2 Kenyon's R. 289; *Crowley's case*, 2 Swanst. 73; *Ex parte Harrison*, 2 Smith, 488; *Rex* v. *Ferrers*, 1 Burr. 631.

(*k*) See a form of return to an habeas on the application of a father, *Lyons* v. *Blenkin*, 1 Jacob's Rep. 247, 248.

(*l*) Hawk. b. 2.

(*m*) *Ex parte Beeching*, 4 Bar. & C. 136; 6 Dowl. & Ryl. 209, S. C.; Tidd, 9 ed. 347; 2 Burn's J. 26 ed. 1085.

(*n*) *Rex* v. *Bethel*, 5 Mod. 19; Bac. Ab. Hab. Corp.

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motion whether the party shall be discharged or bailed, and if the latter, will direct the bail to be taken before a magistrate in the neighbourhood. (*o*)

With respect to the number and amount of the *bail*, the Court of King's Bench invariably require four sureties on charges of felonies. (*p*) The rule is, where the offence is *primâ facie* great to require good bail, moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure, for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge. (*q*) Nor will the court, at the instance of the prosecutor, increase the amount of the bail after they have once been taken. (*r*) The bail do not, as in civil cases, formally depose to their sufficiency, but after reasonable time for inquiry, are taken absolutely. (*s*)

Present practice as to application to the Lord Chancellor.

It will be observed that the principal habeas corpus act, 31 Car. 2, c   only relates to *criminal charges*, and only authorizes the Chancellor to issue an habeas corpus in *vacation*, whilst the 56 Geo. 3, c. 100, only applies to imprisonments, not for crimes, and gives the Chancellor no jurisdiction whatever. But the Lord Chancellor has at *common law* jurisdiction to grant an habeas corpus as well in vacation as in term, and Jenkin's case, in which Lord Nottingham was of a contrary opinion, has been overruled. (*t*) But in modern practice, an application to the Chancellor is seldom made under the statute of Car. 2, or at common law, except in cases depending in his own court, for the ordinary purpose of commitment, or of changing the custody. (*u*)

Practice of discharging a party on *Summary* application.

But besides the mode of being relieved from illegal imprisonment by writ of *habeas corpus*, there are numerous cases where by particular acts of parliament, or by the practice of each court, a party is to be discharged on motion, and sometimes by mere application to the judge. As where an ambassador or his servant, (*x*) or a certificated bankrupt, (*y*) or a discharged in-

(*o*) *Rex* v. *Jones*, 1 Bar. & Ald. 209; *Rex* v. *Massey*, 6 M. & S. 108. Mr. Evans, in his collection of statutes, observes, that the liberty of the subject would be materially promoted by giving the judges a discretionary power to discharge from illegal commitments by rule of court or order, without the necessity of the actual appearance of the party, which in most cases has no other effect than a great accumulation of expense, and the necessity of which often occasions a material failure of justice, as any person who has been in the habit of perusing the calendar of courts of quarter sessions will be easily convinced of.

(*p*) *Rex* v. *Shaw*, 6 D. & R. 154.

(*q*) *Rex* v. *Wilkes*, 2 Wils. 159.

(*r*) *Rex* v. *Salter*, 2 Chit. R. 109.

(*s*) *Rex* v. *Hall*, 2 Bla. R. 1110; Tidd, 9 ed. 253, note (*d*).

(*t*) See the judgment of Lord Eldon in *Ex parte Crowley*, 1 Swanst. 1; Buck, 264, S. C.; 1 Mad. Ch. Pr. 21.

(*u*) *Ex parte Oliver*, 2 Ves. & Bea. 248; 2 Mad. Ch. Pr. 711; Chit. Eq. Dig. tit. Practice, xliv. 1031.

(*x*) Tidd, 9th ed. 199, 201, 212, 214, 216.

(*y*) 6 Geo. 4, c. 16, s. 126.

solvent, (z) or where a party has been arrested whilst attending the court as a party or witness. In these cases, although a *habeas corpus* may be requisite if the officer wrongfully refuse to bring the party into court, (a) yet in general that writ is not necessary, and the party may be discharged on affidavit and motion, or sometimes by summary application even without affidavit, and upon mere undisputed statement to the court or the judge sitting at nisi prius at the time the illegal arrest has been made. (b) A summary mode of interfering, which, when the facts are not disputed, is exceedingly salutary, and advisable to be extended. (c)

Preventive remedies in the Superior Courts.

The *preventive* remedies by application to the *Superior Courts* are, *first*, those to Courts of *Law*, and *secondly*, those to Courts of Equity. The former are few compared with the latter, which are of great variety. In Courts of Law sometimes *preventive proceedings* may be adopted, as summary applications and motions to set aside a warrant of attorney and judgment thereon, which it is feared may be attempted to be enforced; (d) or to set aside an annuity under the 53 Geo. 3, c. 141; (e) or where a similar summary proceeding has been given by particular statutes, or may be founded upon the general practice of each court in respect of some irregularity in the proceedings. The ancient writ of *Estrepement of Waste* was also an advantageous proceeding at common law to *prevent waste*, and might now with utility be revived in practice; (f) and at common law the writ *Quod permittat prosternere* a *nuisance*, was and still might be a very effective proceeding to *prevent* the *continuance* of a private nuisance. (g) But in modern times the *preventive* proceedings in equity by bill and injunction have been found so summary and salutary, that at present recourse is scarcely ever had to any of the ancient specific common law remedies.

First, In courts of Common law

Secondly, Preventive remedies in *Courts of Equity* in general.

Courts of Equity have a very *extensive*, *expeditious*, and *summary jurisdiction* by writ of *Injunction*, and founded on a bill filed to *prevent*, and sometimes *virtually* to *remove*, most

(z) 7 Geo. 4, c. 57, s. 60; 1 Geo. 4, c. 119, s. 26; Tidd, 214, 215.

(a) *Solomon* v. *Underhill*, 1 Campb. 229; *Ex parte Tillotson*, 1 Stark. R. 470;

(b) Tidd, 9th ed. 216, 197, 198; *In the matter of* ——, 1 Rose, 230.

(c) *Ante*, 694, note (o), and Mr. Evans's note.

(d) Tidd, 9th ed. 545 to 556.

(e) Tidd's Pr. 9th ed. 521; and see Chit. Col. Stat. tit. Annuities, 23.

(f) See 3 Thomas, Co. Lit. 242, in notes; 3 Bla. Com. 226, 227.

(g) 3 Bla. Com. 221, 222.

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private injuries and *public nuisances*. It has been observed in a valuable work, (*h*) that an injunction is a writ issuing by the order and under the seal of a Court of Equity, of *two* kinds, the one *remedial*, the other *judicial*; the former to *prevent* injuries, the latter to *enforce* a *decree* for specific performance and in the nature of an execution, containing a direction to yield up, to quit, or to continue the possession of houses or land, followed by a writ to the sheriff commanding him to deliver the possession. The former may relate to proceedings in Courts of Law, as to stay proceedings in Courts of Law, or in the Spiritual Courts, or in Courts of Admiralty, or in some other Court of Equity, or, as unconnected with legal proceedings, may be to restrain the indorsement or negotiation of bills of exchange and promissory notes, or the sale of land, or the sailing of a ship, the transfer of stock, or the alienation of a specific chattel, to prevent the wasting of assets or other property pending a litigation, to restrain a trustee from assigning the legal estate, or any party from setting up a term of years and thereby precluding the trial of the real right, or to restrain assignees from making a dividend, to prevent a party from removing out of the jurisdiction, or marrying, or having any intercourse with a ward or even parent, which the court disapproves of; to restrain the commission of every species of waste to houses, mines, or timber, or any other part of the inheritance; (*i*) to prevent the infringements of patents and the violation of copyrights, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader to restrain vexatious or multifarious suits, or to quiet possession before pending suit or after decree, or to stop the progress of other vexatious litigation. These are the principal instances of the interference of courts of equity to prevent injustice. (*k*) But we will presently examine injunctions fully, and under the following arrangement, viz. first, as relates to the Person; secondly, Personal Property; and thirdly, as to Real Property.

It will be found that the interference of Courts of Equity is a jurisdiction assumed at common law, and is rarely exercised by authority of any legislative enactment. (*l*) The *principle* upon which the courts interfere is, that if the party were allowed to proceed in his wrongful act, an action might afford

(*h*) Eden on Injunctions.

(*i*) So to prevent waste by a tenant in common on account of his poverty, though the court would not otherwise have interfered, 3 Thomas, Co. Lit. 244, note 26; *Smallman* v. *Onions*, 3 Bro. C. C. 621.

(*k*) Eden on Injunctions, 2.

(*l*) Id. Ibid. 264.

but an imperfect remedy for the injury, and damages might be incapable of complete proof, the injury might be to an incalculable extent, and the wrong-doer insolvent, and unable to make compensation; (*m*) and the proceedings in many of these cases, as in those of waste and piracy of copyrights, besides preventing the wrong-doer from future waste or injury, compels him to keep and render an account, and make compensation for the past. (*n*) And although the court will sometimes refuse to grant an injunction in the first instance, on the ground that the right is doubtful, yet they will frequently compel the defendant in the mean time to keep an account of his sale and profits, and in case the decision should be finally against him, to render the same and pay what is just. (*o*) Consequently it is better to suspend the completion of the expected injury until at least the right to commit it has been tried. It will be observed that as there is no compensation at law in damages for the consequences of maliciously or without adequate cause granting an injunction, and thereby preventing another person from exercising his trade, or pursuing any other profitable undertaking, great caution should be observed before granting an injunction.

Courts of equity will not interfere to prevent a Crime nor a *Libel*.

It should seem that the principles upon which injunctions are in general granted would apply even more strongly to prevent the commission of *crimes*, the law for *preventions of crimes* being even preferable to those of *punishment*. (*p*) But nevertheless the general rule is, that Courts of Equity will not interfere to prevent the commission of *any crime*, (*q*) excepting to restrain a libel upon an infant (who is under the peculiar protection of a Court of Equity), (*r*) and excepting such cases of *public nuisances* as are more particularly injurious to particular individuals in the neighbourhood, and also constitute *private* injuries. (*s*) In the case of Gee *v.* Pritchard, (*r*) the counsel, in support of a motion to dissolve an injunction against publishing letters, having cited Hudson's Treatise on the Court of Star Chamber, (*t*) and urged that there was no trace of any inter-

(*m*) See observations as to injunctions against piracies in *Hogg* v. *Kirby*, 8 Ves. 225; and in *Wilkins* v. *Aiken*, 17 Ves. 424; Eden, 264; 1 Mad. Ch. Pr. 126, 127, 150, and *post*.

(*n*) Eden on Injunctions, 160.

(*o*) *Wilkins* v. *Aiken*, 17 Ves. 422; 1 Mad. Ch. Pr. 150.

(*p*) *Ante*, 19.

(*q*) *Holderstaffe* v. *Saunders*, 6 Mod. 12; *Lord Montague* v. *Dudman*, 2 Ves. S. 396; 1 Mad. Ch. Pr. 126, n. (*l*), 159, 255, 256; Eden's Inj. 42, 315 to 318; *Southey* v. *Sherwood*, 2 Meriv. 440, 441; and see *Webster* v. *Webster*, 3 Swanst. 490, where the chancellor said the circumstance of a name being improperly used on a bill in fraud of the public, is no ground for applying for an injunction.

(*r*) *Gee* v. *Pritchard*, 2 Swanst. 413.

(*s*) *Mayor of London* v. *Bolt*, 2 Ves. J. 129; *Attorney General* v. *Cleaver*, 18 Ves. 211; Eden, 224 to 226.

(*t*) 2 Collect. Jurid. 1, 239.

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ference of that tribunal by injunction or otherwise on the subject of letters unless the *publication was libellous*, the chancellor said, " It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime, and *I have no jurisdiction to prevent the commission of crimes*, excepting of course such cases as belong to the protection of *infants*, when a dealing with an infant may amount to a crime, an exception arising from that peculiar jurisdiction of this court." And he further observed, that an injunction cannot be sustained on the ground that the publication of the letters will be painful to the feelings of the plaintiff; and he said neither can this injunction be maintained on any principle of this sort, that if a letter had been written in the way of friendship, either the continuance or discontinuance of that friendship affords a reason for the interference of the court. (*u*) In short, courts of equity will not interfere to *prevent* the commission of any crime whatever, as to prevent the publication of a libel, (*x*) and therefore when the publication of letters has been prevented, it has been on the ground of *copyright* in the writer, and not with any view to prevent the libel. And it has been said that a Court of Equity has no cognizance of a libel unless it is a contempt by being *an abuse of their proceedings*, as scandalizing the court or the parties, or prejudicing mankind before the cause has been heard. (*y*) And in the work before referred to, speaking of the observations of Lord Ellenborough in the case of Du Bost *v.* Beresford, that " upon an application to the lord chancellor he would have granted an injunction against the exhibition of a libellous picture," it is stated that that proposition was a hasty dictum, and obviously erroneous, and excited the astonishment of all the practitioners of the Courts of Equity. (*z*) So speaking of *frauds*, it has been laid down that some are of such turpitude that only the criminal courts have jurisdiction over them, because Courts of Equity do not affect to consider fraud in the light of a crime; it is not their province to punish, nor have they a censorial authority; they interfere in cases of fraud in a civil, and not in a criminal point of

(*u*) *Gee* v. *Pritchard*, 2 Swanst. 413; *Lawrence* v. *Smith*, 1 Jacob's Rep. 473.

(*x*) *Gee* v. *Pritchard*, 2 Swanst. 402 to 422; and see observations of Lord Eldon in *Southey* v. *Sherwood*, 2 Merlv. 440, 441; and see *In re Champion*, 2 Atk. 469; Eden on Injunctions, 315 to 318.

(*y*) *In re Champion*, 2 Atk. 469.

(*z*) Eden, 315, 316; *Du Bost* v. *Beresford*, 2 Campb. 511; *ante*, 20, 648 (*g*); Howell's St. Tr. 799, note. As the chancellor is a justice of the peace, and may require surety of the peace, *semble*, he might clearly in that character have prevented the publication of the picture.

view. (a) Nor in the case of *bills* will a Court of Equity entertain an injunction to prevent a fraud upon the public. (b)

It should seem on principle, that as the chancellor is *virtute officii*, the principal justice of peace in the kingdom, and may issue a writ of supplicavit, and require sureties to keep the peace, (c) he at least ***has power*** to ***prevent*** all breaches of the peace and offences having that tendency, and consequently might, if so disposed, prevent the publication of a libel. (d) And in one case Lord Macclesfield considered that the court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained injurious reflections on religion or morality. (e) So Lord Hardwicke appears to have considered that an injunction lies in the case of private persons entering *by force* into ground of which another has had possession for twenty-one years, though in such case there is a remedy at law, and though the offence is indictable. (f) So in case of public nuisances they may be restrained. (g) And it seems to be admitted, that when criminal matters are mixed up with civil, a Court of Equity may interfere; (h) and whenever the Chancellor or a Court of Equity has jurisdiction to prevent *crime*, it will be admitted to be most salutary that it should be exercised.

At all events a Court of Equity so far examines into criminal matters, that, as observed by Lord Eldon, it will not decree an account of the unhallowed *profits of libellous publications* in favour of a supposed author or proprietor of the copyright; (i) and the court always exercises a jurisdiction over *proceedings* in a suit there depending to prevent permanent and unnecessary libel therein, as upon reference to the master to expunge impertinent scandalous statements, whether in an affidavit in lunacy or bankruptcy, or other proceeding; (k) or they will refuse to hear scandalizing depositions containing general

(a) 1 Madd. Ch. Pr. 255, 256; *Waltham* v. *Broughton*, 2 Atk. 43; and *Ball* v. *Coutts*, 1 Ves. & B. 298.

(b) *Webster* v. *Webster*, 3 Swanst. 490, *ante*, 697, note (q); and *post*.

(c) *Ante*, 683; Burn's J. Justice of Peace; 1 Hawk. P. C. c. 8, s. 2.

(d) An ordinary justice of the peace may issue his warrant to apprehend a person for publishing a libel, *Butt* v. *Conant*, *ante*, 648, note (i); and see 5 Coke's R. 125, as to taking a libel to a magistrate, *ante*, 648 (g); and 3 Burn's J. 448; Dalt. J. c. 1; Burn's J. Surety, Peace.

(e) *Barnett* v. *Chelwood*, 2 Meriv. 441, note; but see Eden, 316, 317.

(f) *Hughes* v. *Trustees of Morden College*, 1 Ves. 189.

(g) *Mayor of London* v. *Bolt*, 5 Ves. J. 129; and *post*.

(h) Eden on Injunctions, 42, n. (c).

(i) *Wolcott* v. *Walker*, 7 Ves. 1; and *Southey* v. *Sherwood*, 2 Meriv. 437; *Lawrence* v. *Smith*, 1 Jacob's Rep. 473, 474, and notes.

(k) See in general 2 Mad. Ch. P. 167, 215, 276, 352; *Ex parte Le Heup*, 18 Ves. 221; *Earl of Portsmouth* v. *Fellowes*, 5 Mad. 450; *Davenport* v. *Davenport and Gel*, Mad. 251; Chit. Eq. Dig. Practice, Reference, as to scandal; 3 Bla. Com. 427, in notes.

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abuse, (*l*) a jurisdiction which indeed all courts of law exercise over their own proceedings. (*m*) So a plaintiff in equity has a right upon application to have an answer taken off the file in order to prosecute the defendant for perjury, being in furtherance of public justice. (*n*) So that at least a Court of Equity will not *impede* criminal proceedings, (*o*) unless in cases where a prosecutor is also proceeding in chancery, when he may be *restrained* from proceeding upon an indictment; (*p*) and there are many instances in which a Court of Equity will collaterally assist or restrain criminal proceedings; (*q*) and we have seen that the Chancellor may compel parties to give security to keep the peace or be of good behaviour. (*r*) This court also so far regards crimes, that it will not enforce a specific performance of an agreement to grant a lease to a person who it appears has, after the agreement, committed a felony rendering him an unfit lessee; (*s*) but a Court of Equity will not compel a discovery in aid of criminal proceedings. (*t*)

The practice in obtaining an injunction. (*x*)

In some urgent cases an injunction will be granted upon *petition and affidavit*. (*u*) But in general the proceeding to obtain an injunction must be by first filing *a Bill*, (*x*) (except to stay waste or proceedings at law,) (*x*) stating the cause of complaint and praying the interposition of the court, and an injunction should be specially prayed. (*y*) But immediately after the bill has been filed, and upon *proper affidavits*, and a *motion ex parte*, even before the defendant has been served with process on the bill or knows of any proceeding, an injunction may in cases requiring immediate interposition be obtained, even within a very few hours after the cause of proceeding has arisen. (*z*) The cases in which the court usually interferes thus summarily are those of irreparable waste, plain nuisance, infringement of a clear copyright, forcible entry, wasteful trespass, executors wasting assets, and danger of a bill being unjustly negociated. (*a*) But excepting in the case of waste, or great injury to an estate, an injunction out of term can only be

(*l*) *Watkins* v. *Watkins*, 2 Atk. 96.

(*m*) *Sanderson's Bail*, 1 Chit. Rep. 676; Tidd, 9th ed. 274.

(*n*) *Stratford* v. *Green*, 1 Ball & B. 294.

(*o*) *Ex parte Wood*, 1 Atk. 221.

(*p*) *Mayor of York* v. *Pilkington and others*, 9 Mod. 273; 1 Atk. 282, S. C.; *Attorney General* v. *Cleaver*, 18 Ves. J. 220; 1 Chit. Crim. L. 304; and see Eden on Injunctions, 42, 43.

(*q*) See instances collected, Chit. Eq. Dig. Jurisdiction, viii; *Mayor of York* v. *Pilkington*, 2 Atk. 302.

(*r*) *Ante*, 683.

(*s*) See dictum in *Willingham* v. *Joyce*, 3 Ves. 168; 1 Mad. Ch. Pr. 421.

(*t*) 2 Ves. 398; Mitford, Pl. 150.

(*u*) 2 Mad. Ch. Pr. 216; 2 Newl. 335.

(*x*) 4 Ann. c. 16, s. 22; Eden, 49. See the full practice, *post*, second volume.

(*y*) 2 Mad. Ch. Pr. 171, 216; 2 Newl. 339.

(*z*) See the instance in Trespass, *post*, and 1 Mad. Ch. Pr. 126, 127; 2 Id. 217.

(*a*) 2 Mad. Ch. Pr. 217.

moved for on a seal day, though sometimes it may be *heard* on other days.(*b*)

Pending proceedings at law does not prejudice.

It seems to be a general rule that it is no objection to the granting an injunction that the plaintiff has commenced an action at law; and in one instance where this was the case and it was offered to discontinue the action, if necessary to entitle the parties to the injunction, Lord Eldon held it immaterial.(*c*)

The effect of an injunction and proceeding for a contempt.

The effect of an injunction *in general* is only in *personam*, i. e. to attach and punish the party if disobedient in violating the injunction;(*d*) and in case of nonobservance, the modern practice is, where the party is in contempt for breach of the injunction, to give notice of a motion that the defendant *may stand committed* for breach of the injunction, and which is moved upon affidavit of the service of the injunction and of the contempt.(*e*) If the other side be not immediately prepared to resist the motion, the court usually gives a day to show cause against it, and then upon hearing the affidavits on both sides decides whether the party has been guilty of the breach and contempt, and if guilty the court makes an order for his commitment, and he will not be discharged unless he pays the adverse party his costs.(*f*)

In case of a writ of injunction in the affirmative, as to yield up, quiet, or continue possession of houses or land, though the strict primary decree of a Court of Equity, as observed by Lord Hardwicke, is in *personam*, yet it has been long established that that court will not only commit the party for his contempt, but will issue *a writ of assistance to the sheriff* to put the complainant into possession, in a suit of lands;(*g*) and after recovering at law upon a writ of dower, or in ejectment, if the possession be withheld or disturbed after it has been delivered, proceedings may in some cases be advantageously had in this court.(*h*)

Particular cases in which Courts of Equity will grant or refuse an injunction.

We will now proceed to consider the principal injuries which may be prevented by *injunction* as they relate to the *person* or to *personal* or *real* property.

I. As respects the *person*.

I. With respect to the *Person*, we have seen that the Chancellor may prevent a breach of the peace by requiring

(*b*) *Rowe* v. *Jarrold*, 5 Mad. R. 45; *Fielding* v. *Capes*, 4 Mad. R. 393.

(*c*) *Attorney General* v. *Nichol*, 3 Meriv. 687.

(*d*) Eden, 363.

(*e*) Eden, Inj. 76; *Angerstein* v. *Hunt*, 6 Ves. 488.

(*f*) Harr. Ch. Pr. 552; *Bullen* v. *Ovey*, 16 Ves. 141; *Leonard* v. *Attwell*, 17 Ves. 385.

(*g*) Eden on Injunction, 363, 364.

(*h*) Id. 364, 365.

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sureties of the peace,(i) or may prevent a continued illegal imprisonment by habeas, but that a Court of Equity will not interfere to prevent a libel unless on the ground of copyright or to protect an infant.(k)

The Court of Chancery has a very summary and extensive *preventive* jurisdiction in protection of the ***Relative Rights of persons***, as between husband and wife, parent and child, and guardian and ward; and it is frequently particularly desirable in those cases to apply to that court for an immediate injunction.

We have seen that a Court of Equity will bind the ***Husband*** to keep the peace towards his wife but will not remove her from him.(l) And in an injunction to restrain the husband from preventing his wife's solicitor and friends from having access to her, she being confined by dangerous illness in his house, to enable her to execute a deed of appointment under a power in her marriage settlement, was refused, it not being proved that she had given instructions for such a deed, and it was doubted whether under any circumstances such an injunction could be granted.(m) Generally speaking, as respects cruelty to the wife and alimony, her more *permanent* remedies are in the Spiritual Court.(n)

An injunction may be obtained *by a Parent* to prevent the marriage of his son, aged eighteen, and restraining communication with him until further orders, and that service of the order at the house, which appeared to be the last place of abode, though apparently shut up, should be good service;(o) and a Court of Chancery will assist a parent or guardian in compelling the son or ward to obey their legal desires; and where an infant went to Oxford contrary to the orders of his guardian, who wished him to go to Cambridge, the court sent a messenger to carry him from Oxford to Cambridge, and on his removing back to Oxford another messenger was sent to carry him to Cambridge and keep him there.(p) And where a presbyterian, having three daughters bred up in that persua-

(i) *Ante*, 683.

(k) *Ante*, 697; *Gee* v. *Pritchard*, 2 Swanst. R. 402; *In re Champion Newspaper*, 2 Atk. 469; Eden on Injunction, 41.

(l) *Ex parte King*, Amb. 334; 2 Ves. 578, S. C.

(m) *Middleton* v. *Middleton*, 1 Jac. & W. 94; and see *Rex* v. *Middleton*, 1 Chit. Rep. 654, where an application to a court of law for a *habeas corpus* was refused; and see Chit. Eq. Dig. 500.

(n) *Legard* v. *Johnson*, 3 Ves. J. 352.

(o) 1 Mad. Ch. Pr. 348; *Pearce* v. *Crutchfield*, 14 Ves. 206; *Sherwood* v. *Sanderson*, 19 Ves. 282; Chit. Eq. Dig. 1039, tit. Infant, 528, 529; Eden, Inj. 297. But the infant must be a *ward* in chancery, 2 Atk. 535, 539; Chit. Eq. Dig. 736; but which is constituted by filing a bill as on his behalf, and which of itself makes him a ward, 1 Mad. Ch. Pr. 332.

(p) *Tremaine's case*, 1 Strange, 167; *Hall* v. *Hall*, 3 Atk. 721.

sion, and three brothers who were presbyterians, made his will, appointing his brothers and also a clergyman of the Church of England guardians to his three infant daughters, and died, having sent his eldest daughter to his next brother, and the clergyman got possession of his two daughters and placed them at a boarding-school where they were educated according to the Church of England, and then filed a bill to have the eldest daughter placed out with the other daughters, and the three Presbyterian brothers brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed that he would have his children bred up Presbyterians; but the court declared that no proof out of the will ought to be admitted in the case of a devise of a testamentary guardianship any more than in a case of a devise of land, and that the decision of the majority of the guardians ought to govern; and directed that the master should inquire whether the school at which the two youngest daughters were placed was proper, and as to the eldest, who was of the age of sixteen, she was brought into court and asked where she desired to be; and on her declaring her wish to be with one of her uncles, it was ordered accordingly.(q)

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If a child be grown up, but not of age, and be about to quit the kingdom, even to go into Scotland, a writ of *ne exeat* may be obtained to prevent him, and if gone he might by the great or privy seal be required to return, and if he should not obey, his property would be taken.(r)

On the other hand the Court of Chancery will in many cases of immorality or ill treatment, or even insolvency, deprive a father of his natural and legal right to the custody of his child, and will restrain him from taking such child abroad.(s)

The jurisdiction of the Lord Chancellor in the Court of Chancery to controul the authority of the parent over his children, or to deprive him of their care and custody for proper cause, had been long acknowledged and acted upon, but was not established by the House of Lords until the case of Wellesley *v.* Wellesley, in which the jurisdiction and its application were fully considered.(t)

(q) *Storke* v. *Storke*, 3 P. Wms. 51; *Anon.* 2 Ves. 56; *Duke of Beaufort* v. *Berty*, 1 P. Wms. 703. As to the cases where the Court of Chancery will or not controul a parent in the possession or conduct towards a child, see 1 Bla. Com. 17 notes, and Chitty's Eq. Dig. tit. Parent and Child; and tit. Jurisdiction; and *ante*, 64.

(r) *De Manneville* v. *De Manneville*, 10 Ves. 63; 1 Mad. Ch. Pr. 333.

(s) *Whitfield* v. *Hales*, 12 Ves. 492; *De Manneville* v. *De Manneville* 10 Ves. 52; Eden, Inj. 297; 1 Mad. Ch. Pr. 332.

(t) *Wellesley* v. *Wellesley*, 1 Dow's R. New S. 153, July 4, 1828; *ante*, 64, 65.

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II. Injunctions relating to *Personal Property.* (u)

II. With respect to *Personal Property*, injunctions are usually to restrain a partner or agent from making or negociating bills, notes, or contracts, or doing other acts injurious to the partner or principal; to restrain the negociation of bills or notes obtained by fraud, or without consideration; to deliver up void or satisfied deeds; to enter into and deliver a proper security; to prevent breaches of some contracts, and enjoin the performance of others; to prevent breaches of confidence or of good faith; to prevent improper payments, sales, or conveyances; also bills *quia timet*, to prevent loss to a remainderman, or waste by an executor or administrator; to prevent the sailing of ships; or more frequently the infringement of copyrights or patents.

1. Injunctions against *Partners.*

1. If it be apprehended that a *Partner*,(x) whether so in writing or by parol,(y) is about unjustly or fraudulently to make, issue, or circulate bills or notes or contracts in the name of the firm, or that he will receive and misapply the assets, then upon a bill filed and proper affidavit an *Injunction* to prevent the same may immediately be obtained; (x) and this is essential when the before suggested precautionary measure of giving notice may be inadequate to prevent the completion of the fraud. (z) This also is the proper proceeding when one of several partners refuses to concur in signing notice of dissolution to be inserted in the Gazette, and it is expected that he will improperly issue bills in the name of the firm. (a) The Court will not, when a bill against a partner prays an account, lend itself to the purpose of carrying on the partnership, and therefore it seems essential that the bill filed should in that case pray a dissolution as well as a final account. (b) The affidavit to obtain an injunction in a case of this nature must show actual misconduct, and not a mere apprehension or an existing strong temptation to act fraudulently, for fraud or misconduct is not to be presumed. (c) A Court of Equity has refused to decree

(u) The principles upon which Courts of Equity decree or refuse a *specific performance* of contracts, and which will be considered in a following chapter, will be found in many respects to apply to injunction bills.

(x) *Master* v. *Kirton*, 3 Ves. J. 74 *Ryan* v. *M'Math*, 3 Bro. C. C. 15; *Newsome* v. *Coles*, 2 Campb. 619; *Lawson* v. *Morgan*, 1 Price, R. 503; *Ex parte Noakes* 1 Mont. on P. 93; *Solly* v. *Moore*, 8 Price, 631; *Houlditch* v. *Nias*, Id. 689; *Hartz* v. *Schrader*, 8 Ves. 317; Chitty on Bills, 8 ed. 58, 61; 1 Mad. Ch. Pr. 159, 160.

(y) *Master* v. *Kirton*, 3 Ves. J. 74.

(z) *Ante*, 442 to 447.

(a) *Master* v. *Kirton*, 3 Ves. J. 74, *Ryan* v. *M'Math*, 3 Bro. C. C. 15; *Newsome* v. *Coles*, 2 Campb. 619; *Lawson* v. *Morgan*, 1 Price, R. 503; *Ex parte Noakes*, 1 Mont. on P. 93; *Solly* v. *Moore*, 8 Price, 631; *Houlditch* v. *Nias*, Id. 689; *Hartz* v. *Schrader*, 8 Ves. 317; Chitty on Bills, 8 ed. 58, 61; 1 Mad. Ch. Pr. 159, 160.

(b) *Loscombe* v. *Russell*, 1 Clark & Fin. 8; Eden's Inj. 307.

(c) *Glassington* v. *Thwaites*, 1 Sim. & S. 124; *Lawson* v. *Morgan*, 1 Price, R. 303.

that the name of a partner shall be erased; (*d*) and an injunction will not be granted to restrain surviving partners from using the name of a deceased partner in the firm of a trade, (*e*) because it was impossible, under the circumstances, that using the testator's name in the trade could subject his estate to the trade debts; and supposing the so using his name might be a fraud upon the public, that was no ground for applying to a Court of Equity for an injunction; (*f*) the bill could only bind the survivors, and not affect the estate of the deceased partner, (*g*) and consequently no injunction was requisite.

If the partner against whom the application is made positively deny the imputed misconduct, then an injunction in the first instance will either not be granted, or will be dissolved, and the suit will proceed to hearing. (*h*)

2. Injunction against an *Agent* or *Attorney* disclosing secrets, &c.

2. The principle of these cases also extends to *Attornies* or *Agents* who may by bill and *injunction* be prevented from issuing or circulating or misapplying bills or notes to the injury of their principals, or from otherwise acting contrary to their duty, (*i*) and who, if they should improperly sue even a third person in prejudice of their principal, may be restrained in equity; and, on the other hand, if the principal improperly attempt to subject him to liability, he may equally obtain relief. (*k*)

If the retainer or employment of an attorney or solicitor has been determined on account of misconduct, or he has, after his employment has ceased, acted tortiously towards his former employer, he may by injunction be restrained from communicating information that came to him confidentially from his client. (*l*) So an agent or other person may be restrained by injunction from the disclosure of secrets communicated to him in the course of any confidential employment (*m*) or treaty; (*n*) but the Court of Equity will not, on motion, restrain a solicitor from giving evidence of confidential matters, the propriety of his being examined in breach of professional confidence being left to the consideration of the court before which he might appear as a witness; (*o*) but this does not extend to the disclo-

(*d*) *Ryan* v. *M'Math*, 3 Bro. C. C. 15.
(*e*) *Webster* v. *Webster*, 3 Swanst. 490.
(*f*) Id. ibid.
(*g*) *Usher* v. *Dauncey*, 4 Campb. 97.
(*h*) *Littlewood* v. *Caldwell*, 11 Price, 97.
(*i*) *Solley* v. *Moore*, 8 Price, 631; and see Chitty on Bills, 31 to 41.
(*k*) *Kidson* v. *Dilworth*, 5 Price, 564; 1 Buck, 113; Chitty on Bills, 8 ed. 39.
(*l*) *Beer* v. *Ward*, 1 Jac. 77; 1 Mad. Ch. Pr. 160; *ante*, 436.
(*m*) *Evitt* v. *Price*, 1 Sim. 483; *Yorat* v. *Winyard*, 1 Jac. & W. 394.
(*n*) *Williams* v. *Williams*, 3 Meriv. 157.
(*o*) *Beer* v. *Ward*, 1 Jac. 77. In *Moore* v. *Terrell*, K. B. Easter T. 1833, the whole court said, that after consulting with the Lord Chancellor and some of the other

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sure of a secret respecting an expired patent; (p) nor will a clerk of a solicitor commencing practice for himself be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. (q)

3. Injunction to prevent the *Negociation* of Bills, Notes, &c. (r)

3. So a Court of Equity will, upon a bill filed, grant an injunction to *prevent the negociating* or parting with *a Bill or Note* obtained upon an illegal transaction, as at play, upon affidavit of the facts, and this immediately after filing the bill, and even before service of the subpœna to appear; (s) and the circumstance of there being an available defence at law on the ground that the bill was absolutely void even in the hands of a *bonâ fide* holder, constitutes no answer to an application for an injunction to prevent the negociation of the instrument, because by a change of holder the situation of the applicant might be unjustly prejudiced in the means of defence. (t) It is established generally that a Court of Equity, when a bill has been obtained or is about to be negociated fraudulently or without consideration, will in general, by injunction, restrain the circulation, and either detain or sometimes compel the owner to deliver it up to be cancelled; (u) and they will stay all proceedings in an action on a bill accepted by a defendant for the accommodation of one of the plaintiffs, (x) or accepted by one partner in fraud of the others; (y) and relief was granted against a bill stated to have been given for value received, but in fact obtained by fraud and for a fictitious consideration. (z) So where a bill or note has been given for money lost by gaming or other illegality, a Court of Equity will grant an injunction to prevent the winner from parting with it, and this even before service of subpœna, (a) and will decree that it shall be delivered up. (b)

judges, the unanimous opinion was, that the rule that an attorney was not bound to disclose the secrets of his client, is general, and not confined to matters relating to a suit: so that the same rule before prevailing in C. P. (*Cromack* v. *Heathcote*, 2 Brod. & Bing. 4; *Gainsford* v. *Grammar*, 2 Campb. R. 9; *Walker* v. *Wildman*, 6 Mad. R. 47,) is now universal.

(p) *Newberry* v. *James*, 2 Meriv. 446.

(q) *Brickenp* v. *Thorp*, 1 Jac. 300. See the consequent danger of a defective title being communicated, *ante*, 436.

(r) See in general, 1 Mad. Ch. Pr. 154; Eden on Injunctions; and Chit. Eq. Dig. Practice, 18; 1056, and xxxv. 962.

(s) *Newman* v. *Franco*, 2 Anst. 519; —— v. *Blackwood*, 3 Anst. 851; 2 Ves. jun. 493; 1 Fonbl. Eq. 43; 1 Mad. Ch. Pr. 154.

(t) *Lloyd* v. *Gurdon*, 2 Swanst. 180; *Hood* v. *Aston*, 1 Russ. Rep. 412.

(u) *The Bishop of Winchester* v. *Fournier*, 2 Ves. jun. 445.

(x) —— v. *Adams and others*, Young's Exch. Rep. 147; Chit. on Bills, 8th edit. 82, note (a).

(y) *Hood* v. *Ashton*, 1 Russ. R. 412.

(z) *Dyer* v. *Tymewell*, 2 Vern. 122; 2 Freem. 112, S. C.

(a) *Lloyd* v. *Gurdon*, 2 Swanst. 180.

(b) *Wynne* v. *Callander*, 1 Russ. 293; —— v. *Blackwood*, 3 Anstr. 851.

So if given for procuring a commission in the army; (c) or for procuring a marriage. (d) So although the bill or note was valid in its origin, yet if the consideration have failed, equity will interfere; as where an acceptance has been given for goods to be delivered and the vendor afterwards refused to deliver them. (e) So the negociation of a bill has, under particular circumstances, been restrained in order to prevent the holder from depriving the defendant of the advantage of a set-off; as where a person who had been a bankrupt, gave a note to his solicitor in payment of his bill of costs for obtaining his certificate, and the solicitor was indebted to the estate, and the bankrupt had purchased so many debts due from his estate, that the share thereof coming to the bankrupt on account of such purchased debts exceeded the amount of what the solicitor owed and also the amount of the note, a Court of Equity restrained the negociation of such note, which would have defeated the set-off. (f) So where an agent has indorsed his own name on a bill, which by accident had been drawn payable to him, but for his principal's use, and the latter, or his trustee, sue such agent as indorser, a Court of Equity will restrain such proceeding. (g) And relief has even been afforded after execution levied on a judgment founded on a warrant of attorney given for an illegal consideration. (h) Though where a defendant has had an opportunity of defending and trying at law, a Court of Equity will not always relieve if he omit to do so. (i) If the defendant, in his answer, admit himself to be holder of the instrument, and the facts as charged, the court will decree the instrument to be delivered up; but in other cases he will only be restrained from negociating it, and left at liberty to try at law. (i) Where the bill has been already negociated, the holder, as well as the original party, should be made parties to the suit. (k) Where a promissory note had been given under suspicious circumstances, it was decreed that it should be deposited with the Registrar of the court, leaving the holder to proceed at law, and if he did not within a reasonable time, then that the note should be delivered up. (l) If after a bill filed for delivering up bills, the plaintiff should fail at law in an

(c) *Whittingham* v. *Bouroyne*, 3 Anstr. 900.

(d) *Smith* v. *Aykewell*, 2 Atk. 566; *Cotton* v. *Catlyn*, 2 Eq. Abr. 525.

(e) *Patrick* v. *Harrison*, 2 Bro. C. C. 476.

(f) *Ex parte Harding*, 1 Buck, 24.

(g) *Kidson* v. *Dilworth*, 5 Price, 564; Chitty on Bills, 8th edit. 39.

(h) *Whittingham* v. *Bouroyne*, 3 Anstr. 900.

(i) *Dunbar* v. *Wilson*, 6 Bro. P. C. 231; *Naylor* v. *Christie*, 8 Price, 534.

(k) *Lloyd* v. *Gurden*, 2 Swanst. 180.

(l) *Bishop of Winchester* v. *Fournier*, 2 Ves. jun. 445.

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action of trover for them, yet he is still entitled to proceed in equity to have them delivered up. (m) It is said that affidavits cannot be read in support of an injunction to restrain the negociation of bills. (n)

In general a Court of Equity will not compel a party by his answer to criminate himself; but some acts contain a particular provision compelling a party to admit the particulars of an illegal transaction. Thus the statute against *Gaming*, 9 Anne, c. 14, s. 3, enacts, "that for the better discovery of the monies or other things so won and to be sued for and recovered back as therein provided, (o) every person liable to be sued shall be obliged and compellable to answer upon oath such bill as shall be preferred against him for discovering the sum or thing won at play." So the act against *Stock Jobbing*, 7 Geo. 2, c. 8, s. 2, contains a similar provision, enacting, "that for the better discovery of the monies or premiums which shall be given, paid or delivered, and to be sued for and recovered as therein mentioned, (p) every person liable to be sued shall be obliged and compellable to answer upon oath such bill as shall be preferred against him in any Court of Equity for discovering any such contract or wager, and the sum of money or premium so given, paid or delivered."

In case of a note obtained from an *Infant* just after he came of age, for extravagant supplies previously made, the negociation may be restrained by injunction and relief afforded. (q) And where a bill or note has already been declared void by foreign competent jurisdiction, a perpetual injunction against its circulation and against proceedings thereon may be obtained. (r) But the practice appears to be, that if upon a bill for discovery and injunction to stay proceedings at law on a bill of exchange, and for delivering it up to be cancelled, and charging fraud, not answered by the defendant, then if the discovery obtained would be a defence at law, an immediate injunction to stay proceedings will be refused, and will only be granted to stay execution. (s)

Upon the other hand, if the answer to an injunction, charging

(m) *Lisle* v. *Liddle*, 3 Anstr. 649.

(n) *Berkeley* v. *Brymer*, 9 Ves. 335; Chitty on Bills, 8th edit. 120; 2 Mad. Ch. P. 366.

(o) A bill can only be filed by the *loser* and not by an *informer*, *Orme* v. *Crockford*, M'Clel. 185. But an answer to a bill filed by the loser may be given in evidence in actions for penalties. *Thistlewood* v. *Cracroft*, 1 Marsh. 497; 6 Taunt. 141, S. C.; *Billing* v. *Pulley*, 2 Marsh. R. 125; and see next note.

(p) This only applies to discoveries as to *monies recoverable back*, and not to the recovery of penalties under the 5th and 8th sections, *Bullock* v. *Richardson*, 11 Ves. 373; and see last note.

(q) *Brook* v. *Galby*, 2 Atk. 34; Barn. 1, S. C.

(r) 2 Eq. Ab. 525.

(s) *Houldich* v. *Nias*, 8 Price R. 689.

that a party obtained a bill of exchange without consideration, swear that the defendant gave adequate consideration without fraud, it suffices in such answer to state the consideration generally, without showing all the particulars. (*t*)

Considerations to be attended to before filing a bill to prevent payment of an alleged debt.

There are inconveniences and consequences which a party should anticipate and well consider before he files a bill, or at least before he moves for an injunction to restrain proceedings at law; for the Court of Equity will sometimes not grant an injunction but upon the terms of *bringing the money into court*, and which money will afterwards be at the disposal of that court, in case upon the hearing it should be considered that the defendant at law is not entitled to equitable relief; and this although perhaps a defence at law might have been sustained without the defendant's thus parting with his money. (*u*) Thus it has been held that if a defendant at law, in an action on a bill, file a bill in equity to restrain the proceedings at law and obtain an injunction upon the terms of bringing the money into the Court of Equity, he impliedly submits to the equitable jurisdiction of that court; and if, upon the subsequent hearing in equity, that court should decree that he is not entitled to equitable relief, the same court may order that the money be paid out of the court to the plaintiff at law, and the defendant cannot move with effect to restrain such payment even until the action at law has been determined. (*u*)

4. Injunction to *deliver up deeds.* (*x*)

4. Whenever a deed or instrument is void at common law or by statute or has been satisfied, a Court of Equity has jurisdiction to order it to *be delivered up;* (*x*) as where it might, if outstanding, be again set up at a distance of time when evidence of its invalidity may have been lost, or when it might constitute A CLOUD upon a title. (*y*) But the court will not order the delivering up of voluntary instruments or powers of attorney which are revocable, and might by another deed be at any time revoked. (*z*) Where an annuity has been insufficiently memorialized, the Court of Chancery will order the *deeds* to be

(*t*) *Webster* v. *Threfall*, 2 Sim. & Stu. 190.

(*u*) *Wynne* v. *Jackson*, 2 Russ. 351. This was so in —— v. *Adams*, Young's Rep. 147; *ante*, 706, note (*x*); though the party filing the bill in that case *ultimately* obtained a *perpetual* injunction, and *received back* the money with intermediate dividends thereon.

(*x*) See in general Lord Eldon's observations in *Mayor of Colchester* v. *Lowton*, 1 Ves. & B. 244; *St. John* v. *St. John*, 11 Ves. 535; Newland on Contr.; Chit. Eq. Dig. tit. Deeds, 309, and tit. Practice, xxxv. 962; and tit. Jurisdiction, i. 586, 587.

(*y*) *St. John* v. *St. John*, 11 Ves. 535; *Mayor of Colchester* v. *Lowton*, 1 Ves. & B. 244; *Hayward* v. *Dimsdale*, 17 Ves. 111.

(*z*) *Coleman* v. *Sarrel*, 1 Ves. sen. 50; *Bromley* v. *Bromley*, 7 Ves. 28; 1 Mad. Ch. Pr. 226, 228.

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delivered up (*a*) upon the terms of an account being taken of the consideration of the annuity, with interest and costs, and of all the annual payments, the balance on either side to be paid and the securities delivered up and a re-conveyance, (*b*) which seems to be a more extensive power than that given to the courts of law by the Annuity Act. (*c*) But forged deeds or writings will not be ordered by the court to be torn or defaced, but to be kept, so that a prosecution may be instituted thereon against the criminal. (*d*) If a party have a just lien on the deeds in respect of a prior legal transaction, although they remained in his possession as a security for a subsequent illegal contract, which has been set aside, his original lien will continue. (*e*) So in case of a valid deed, if a party thereby bound, improperly get possession of it, he will be compelled to restore it to the right owner; (*f*) but not so if the deed were a fraud in law, as to pretend to create a qualification to kill game without intent to convey any beneficial interest, in which cases the court will not assist either party. (*g*) Where a bill *quia timet* was filed to deliver up an apprentice's bond and indenture, he being out of his time, it was ordered that the defendant should either bring his action within a year or deliver up the bond and indenture, for if it were at the master's choice to stay as long as he pleased, he might perhaps stay till the apprentice's witnesses are dead; (*h*) and the same reason applies to the delivering up of bonds and other instruments after they have been satisfied, and which now appears to be an established rule. (*i*)

5. To compel the delivery of a *Proper Security*. (*j*)

5. On the other hand, in general, if a security has by mistake been given upon an improper stamp, a Court of Equity cannot relieve or *prevent* the party from taking the objection. (*k*) But where a party had entered into an express agreement to give a valid note, and had given one on an improper stamp, a Court of Equity, to prevent loss, will enforce the delivery of a valid note; (*l*) and a Court of Equity will relieve even against a surety as well

(*a*) *Underhill* v. *Horwood*, 10 Ves. jun. 218; *Sinclair* v. *Hone*, 6 Ves. 610; 1 Mad. Ch. Pr. 227; *Bromley* v. *Holland*, 7 Ves. 3.

(*b*) *Holbrook* v. *Sharpe*, 19 Ves. 131; 1 Mad. Ch. Pr. 227, 228.

(*c*) 53 Geo. 3, c. 141, s. 6; *Girdlestone* v. *Allan*, 1 B. & C. 61; *Barber* v. *Gamson*, 4 B. & Ald. 281; except in the cases in that section, courts of law can only set aside the *warrant of attorney and judgment*; and see Tidd, 9th edit. 522, note (*f*), 526, note 4.

(*d*) *Frankland* v. *Hampden*, 1 Vern. 66.

(*e*) *Wood* v. *Grimwood*, 10 Bar. & C. 679.

(*f*) *Kurger* v. *Moore*, 1 Sim. & S. 61.

(*g*) *Brackenburgh* v. *Brackenburgh*, 2 Jac. & W. 391; Chit. Eq. Dig. tit. Deeds.

(*h*) 1 Ch. Ca. 70; 1 Eq. Ab. pl. 2; 1 Mad. C. Pr. 223.

(*i*) *Bromley* v. *Holland*, Coop. 29; 1 Mad. Ch. Pr. 226, 227.

(*j*) The rules stated under this head perhaps more properly belong to the subsequent chapter regarding the enforcement of *Specific Performance*.

(*k*) *Toulmin* v. *Price*, 5 Ves. 240; *Ex parte Manner*, 1 Rose, 68.

(*l*) *Aylett* v. *Bennett*, 1 Anstr. 45.

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as a principal, and compel all parties to give a proper bill or note according to their original intention; as where the maker of a note intended that it should be several as well as joint, but it was drawn only as a joint note, in which case, if the surety had died first, there would have been no remedy either at law or in equity against his estate, the court compelled the surety and principal to sign a joint and several note. (*m*) And where, in case of a lost deed or bill or note, there may be no remedy, or not so clear a remedy at law, a Court of Equity will, after indemnity tendered, compel payment in equity; (*n*) and where deeds constituting the evidence of the title to a rent charge have been lost, a Court of Equity has decreed the execution of fresh deeds. (*o*) So, where a woman, at the time of her marriage, was indebted in two promissory notes, and after her marriage the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes, and afterwards, in an action on the bond against the husband, pleaded infancy, the Court ordered the notes to be returned, with directions that the defendant should not plead the statute of limitations to any action on the notes, or any other plea which could not have been pleaded at the time the bond was given. (*p*) So, if a vendor of part of his estate retain the title deeds, a Court of Equity will compel him to execute a covenant to produce them for the purchaser. (*q*)

6. Injunctions to prevent breaches of contract. (*r*)

6. Breaches of *Contract* are either by *commission* or *omission*, and sometimes a Court of Equity will *prevent* the completion of the former by *injunction*, or the latter by decreeing *specific performance*. In general, if the contract merely relate to *personal property*, and be limited to a *single* transaction, and not of a *continuing* nature, Courts of Equity will refuse to interfere, either by injunction or by decree of specific performance, because it is considered that adequate compensation may be recovered at law in the shape of damages for the breach of the contract. (*r*) Thus equity will not in general decree specific performance of a contract to deliver a quantity of corn, hops, stock, or other articles of merchandize, which might be readily purchased elsewhere; and on the same ground equity will not

(*m*) *Ante*, 123, 124, 304; *Rawstone* v. *Parr*, 3 Russ. 424, 529; Chit. Eq. Dig. tit. Mistake, and tit. Agreement.

(*n*) See cases, Chitty on Bills, 8 ed. 290.

(*o*) *Collet* v. *Jaques*, 1 Chan. Cas. 120; Chit. Eq. Dig. 1[illegible]3.

(*p*) *Clark* v. *Lubley*, 2 Cox, 173; Chit. Eq. Dig. 664.

(*q*) *Fain* v. *Ayers*, 2 Sim. & Stu. 533.

(*r*) See in general Eden on Injunctions, 308; Madd. Ch. Pr. Index, tit. Injunction; Chit. Eq. Dig. 1053. 1056, and id. title Specific Performance.

interfere by injunction to prevent a breach. (s) But there are exceptions to that rule, and if it can be shown that the breach of a personal contract of considerable importance would be productive of *very considerable continuing* or *permanent* loss, which could not be adequately compensated at law, then equity will interfere. (t) As if, immediately after payment for horses or goods, the vendor should fraudulently or forcibly obtain possession, and attempt to sell them, if the purchaser were put to his action at law the parties might turn out insolvent, and he might lose his money, his property, and costs, when, by summary and immediate relief, a Court of Equity would prevent such injustice. (u) And therefore, in a late case, which was several times before the Master of the Rolls, and the Vice-Chancellor and the Lord Chancellor, a contract for the delivery of sixteen horses, purchased and paid for by the plaintiff, to work the Red Rover Brighton coach, was enforced in equity, and the horses restored to the plaintiff, without compelling him to proceed at common law. (x) So, in the case of a contract for the purchase of a

(s) *Baxter* v. *Lister*, 3 Atk. 383; *Capper* v. *Harris*, Bunb. 135; 1 Mad. Ch. Pr. 402, 163; 3 Woodd. Vi. L. 464.

(t) See instances 1 Madd. Ch. Pr. 103, and observations Newland on Contracts, 93, where it is stated that Lord Hardwicke seemed to think that if a person should contract for the *purchase of a great quantity* of timber, as a ship carpenter, by reason of the vicinity of the timber, or should contract to sell timber, wanting to clear his land, in order to turn it to a particular sort of husbandry; in these cases the performance of the contract in specie ought to be decreed, in *Buxton* v. *Lister*, and *Taylor* v. *Moche*, 3 Atk. 384, and *Buckingham* v. *Ward*, cited id. and 10 Ves. 162; *Nutbrown* v. *Thomson*, 10 Ves. 159.

(u) Id. ibid.

(x) *Pounsett* v. *Humphreus*, Court of Chancery, 28 March, 1833, *cor.* Lord Chancellor. His lordship, in giving judgment in this case, said it was a question respecting costs. An agreement had been entered into between the parties, by which, upon payment of 800*l.*, *the defendant was to deliver up to the plaintiff 16 horses to work the Red Rover Brighton coach.* The plaintiff paid down the money; and, after some delay on the part of the defendant, he obtained possession of four of the horses, but it did not appear distinctly how. Many appointments were made between the parties to put the plaintiff in possession of the horses, but they were not kept by the defendant. At length, on the 22d of October, 1832, the horses were delivered up to the plaintiff, and were worked for a short time upon the Brighton road. The defendant again recovered 15 of the horses, but it did not appear distinctly how, it seemed to be by force, and delivered them over to Alexander, a livery stable keeper, who immediately advertised the horses for sale by auction. His lordship then stated the terms of the affidavits and facts, and the prior proceedings under which the plaintiff had, by the decision of the Master of the Rolls, recovered back his horses, so that the only point now to be determined was the *Costs*. His lordship said, that from these facts he was of opinion that Alexander could not set up against the plaintiff any lien or claim for the keep of the horses, they having been placed with him by Humphreys, whose property they were not; his claim could be against Humphreys alone, who had and could have no authority to deliver the horses to him. This part of the case must be determined in favour of the plaintiff. *His honour below was evidently of the same opinion, for he ordered the horses to be delivered up to the plaintiff.* It was true that the Vice-Chancellor made the plaintiff pay for the keep of the horses before they were delivered up; but this was without prejudice; and, as it appeared to his lordship that Alexander had no right to the keep or expenses of the horses, this money must be repaid into Court. He was satisfied that Alexander ought not to be allowed his costs in the manner in which they were allowed; it was any thing rather than clear that he had no knowledge of the horses being sold before he received them. In his second affidavit he made a

coach concern, where the vendor agreed not to run another coach in opposition, but did so, and which breach, if suffered to continue, would have been productive of immeasurable loss, an injunction was granted.(y) But the Chancellor afterwards observed, that he had interfered in that case with *some doubt* whether he was not *degrading the Dignity of the Court*, and that he had only so interfered in that *particular case*, because he saw his way, one party having *covenanted absolutely* against interfering with the business, which he had sold to the other.(z) In case of the sale of the *good-will* of a shop and trade therein, although with an express stipulation not to carry on the same business in the neighbourhood, it has been laid down in a work of high authority that an injunction may be obtained against the vendor from afterwards attempting to set up the same trade in the same place.(a) But in other cases a contrary rule has been supposed to prevail, and the courts have refused to enforce specific performance of such a contract, and left the party to law; (b) and have also refused to interfere by injunction to prevent the vendor from afterwards setting up in the same business. (b) But where the exclusive use of a secret of dying bombazeen, in a certain trade, was sold together with the good-will, it appears to have been considered that an injunction might be obtained to prevent the vendor from disclosing the secret, which would be permanently ruinous to the purchaser, who had paid the price of the good-will, (c) and the remedy at law might therefore in that case be inadequate. (d) So an agreement to assign a debt upon the purchase of it may be enforced. (e) But it is said that a proceeding of this nature, in aid of a mere personal contract, ought to be with great caution. (f)

If a contract relate to *Real property*, and the breach might be *permanently* injurious, then it seems an injunction may be obtained; as if a lease contain a covenant to leave a certain

general denial, without regard to particular circumstances; but such a denial might arise from confidence rather than fairness, and may proceed upon calculation rather than ingenuousness; for though he denies generally, he does not pledge himself to any detail. He would, upon the whole, order the money to be paid into court, and reverse that part of his honour's order giving Alexander costs.

(y) *Williams* v. *Williams*, 2 Swanst. 253; *Smith* v. *Fromont*, Id. 330; *Harrison* v. *Gardner*, 2 Madd. R. 198.

(z) *Smith* v. *Fromont*, 2 Swanst. 332.

(a) 1 Madd. Ch. Pr. 163, referring to *Crutwell* v. *Lye*, 17 Ves. 342; and see *Day* v. *Day*, A. D. 1816, Eden on Inj. 314.

(b) *Shackle* v. *Baker*, 14 Ves. 468; *Bexley* v. *Connelly*, 1 Jac. & Walk. 576; *Crutwell* v. *Lye*, 17 Ves. jun. 335; Chit. Eq. Dig. tit. Goodwill, and tit. Trade; but see *Day* v. *Day*, 1816, Eden. Inj. 314.

(c) *Bryson* v. *Whitehead*, 1 Sim. & Stu. 74; and *Williams* v. *Williams*, 2 Swanst. 253; and *Yeovalt* v. *Winyard*, 1 Jac. & W. 394.

(d) *Flint* v. *Brandon*, 8 Ves. 163.

(e) *Wright* v. *Bell*, 5 Price, 325.

(f) *Mitchell* v. *Reynolds*, 1 P. Wms. 181; *Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Harrison* v. *Gardner*, 2 Madd. R. 198; *Davis* v. *Mason*, 5 T. R. 118.

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stock of a certain amount at the expiration of the lease, there may be an injunction to compel observance, and also to prevent pulling down buildings, and removing materials; (*g*) and an injunction may be obtained to prevent waste by breach of a covenant not to dig up ground. (*h*) So an injunction has recently been granted to restrain the Commissioners of Woods and Forests from building upon part of the site of Carlton palace, in violation of the terms of *an agreement* entered into by them with the plaintiffs for a building lease of an adjoining part of the site, and the injunction may be in effect for the removal of the buildings which had been commenced, though the injunction in that case was singularly in the negative, viz. "and also from permitting such part of the buildings as have "been already erected from remaining," &c. (*i*) But it has been considered that a breach of a *common covenant to repair* demised premises is more properly remediable at law, and a bill for specific performance of such a covenant was dismissed with costs; (*k*) and although formerly specific performance of a covenant to *rebuild* was enforced, the subsequent cases render that point doubtful. (*l*) Analogous cases bearing upon this subject will be considered in a following chapter respecting *Specific Performance.*

In order to support a motion for an injunction, it must in general appear that there has been an *inception of,* or at least proceedings towards *an injury,* for otherwise in these cases the application will be considered premature. (*m*)

7. To prevent a breach of *Confidence* or good faith, or to prevent *other loss.*

7. In considering injunctions against agents, we have seen that disclosures of *Confidential Communications* will be prevented. (*n*) So an injunction will be granted to restrain the *disclosure of Secrets* that came to the defendant's knowledge in the course of any confidential employment; (*o*) and an injunction was granted to restrain a defendant from communicating certain recipes for remedies and vending them, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust, (*p*) although from a prior case, it seems doubtful whether a Court of Equity will interfere by

(*g*) *Nutbrown* v. *Thornton*, 10 Ves. 161; *Mayor of London* v. *Hedger*, 18 Ves. 355.

(*h*) 4 Bro. P. C. 395.

(*i*) *Rankin* v. *Huskisson*, 1 Clark & F. 13.

(*k*) *Flint* v. *Brandon*, 8 Ves. 159; 1 Madd. Ch. Pr. 403; Newl. on Cont. 95; *Whistler* v. *Mainwaring and others*, in Chancery, Mich. T. 1773, 3 Woodd. V. L. 464, note (*z*); 3 Atk. 512; 1 Ves. 12.

(*l*) *Lucas* v. *Commerford*, 3 Bro. C. C. 167; but see *Mosely* v. *Virgin*, 3 Ves. 184; 1 Mad. Ch. Pr. 403, 404; Newland on Contr. 94, 95; 3 Woodd. Vin. Lec. 465.

(*m*) *Longman* v. *Broderip*, 3 Anst. 645.

(*n*) *Ante*, 705, 706.

(*o*) *Eritt* v. *Price*, 1 Sim. R. 483.

(*p*) *Yoral* v. *Wingard*, 1 Jac. & W. 394; and see Chit. Eq. Dig. tit. Trade, 1284, 1285.

injunction to restrain a party divulging a secret in medicine unprotected by a patent.(q)

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8. To prevent improper *Payments, Sales* or conveyances.

8. In some cases, where a *Payment* is improperly about to be made, or a *Sale* of property, the right to which is in dispute, is threatened, or where a sale is about to be precipitately and injuriously made, an injunction to prevent such sale, or to prevent a conveyance, may be obtained *ex parte.*(r)

9. Bills *Quia Timet* to prevent loss or inconvenience.(s)

9. When a person is *apprehensive* of being subjected to a future loss or inconvenience, *probable* or even *possible* to happen, or be occasioned by the neglect, inadvertence or culpability of another, or where any property is bequeathed to another after the death of a party in existence, and which the former is desirous of having secured safely for his use, against the effects of any accident which may happen to it previous to the accruing of his right of possession; in either of these cases a bill *quia timet* (*because he fears loss*) may be filed, which on the one hand will quiet the party's apprehension of a future loss or inconvenience, by removing the causes which may lead to it; and on the other, will actually secure for the use of the party the property, by compelling the person in the present possession of it to guarantee the same, by a proper security, against any subsequent disposition or wilful destruction.(t) It will be observed that this is laid down without the qualification of requiring any adequate ground, but in many cases *some adequate ground* must be shown for requiring a person, who may perhaps be a mere trustee, to incur the trouble, and sometimes perhaps difficulty, of procuring adequate securities. But where the party himself ought to have prevented the necessity for the proceeding, then he cannot complain. Thus, if a person have become surety for another for his paying a debt on a certain day, and the time has elapsed, the surety may file a bill to compel him to pay, although such surety has not as yet been troubled or molested for the debt, since it is unreasonable that a surety should always have such a cloud over him.(u) In other cases, when a *trustee or executor* might readily pay the fund into court, a legatee of a sum payable at a future distant

(q) *Williams* v. *Williams*, 3 Meriv. 75; and see *Newberry* v. *James*, 2 Meriv. 446; 2 Chit. Com. L. 198; and see *ante*, 436.

(r) Chit. Eq. Dig. tit. Practice, xlvii. and see *infra*.

(s) See in general, 1 Mad. Ch. Pr. 218 to 225; Chit. Eq. Dig. tit. Pleading, xii. 781. Boundary bills and bills for perpetuating testimony may also be considered as of this nature, see *post*, 722.

(t) 1 Mad. Ch. Pr. 219.

(u) *Ranelaigh* v. *Hayes*, 1 Vern. 190; 1 Eq. Ab. 79; *Lee* v. *Rook*, Mos. 318; 1 Mad. Ch. Pr. 223.

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time may, by a bill of this nature, call upon an executor to secure it for his benefit, and set a sum apart for the purpose, and this without showing any particular reasons, such as wasting assets or insolvency. (*x*) But where, as in the case of a remainder over of goods, a tenant for life is entitled to the *use* of the goods, there must be *real danger* in order to require security, and the court, without its being shown, will only decree the delivery of an inventory. (*y*)

10. To prevent waste of personal property by an Executor or Administrator. (*z*)

10. A bill may be filed and injunction obtained to prevent an *Executor or Administrator* from wasting and sometimes from suing for or receiving assets, and a receiver may be appointed to conduct actions, (*a*) and to compel him to pay into court all that he is not entitled to retain for his own use, (*b*) and sometimes to direct him to pay a share of the residue to a party beneficially entitled. (*c*) So if persons are about to pay money to an insolvent executor, the court will restrain him from receiving it, and if the debtors to the estate collude with him they may be parties to the bill. (*d*) But the mere circumstance that an executor is poor and in mean circumstances, without any fact of misconduct, is not a sufficient ground for this application. (*e*) If an executor admit himself to be a debtor to the testator at his death, he may be ordered by the Court of Chancery to pay the debt into court. (*f*) So where an answer contains a clear admission that there is trust money in the hands of the defendant, the court will always, on an interlocutory application, order it to be paid into court. (*g*) The decision before referred to, that the sureties in an administrator's bond are not liable to be sued at the instance of a legatee or party entitled to the residue, unless there has been a *decree* in the Ecclesiastical Court, and the possibility of death or bankruptcy occurring before such decree can be obtained, render it highly expedient for all parties interested, in cases of any importance, to file a bill of this nature shortly after the death. (*h*)

(*x*) 1 Chan. Ca. 121; and other cases, 1 Mad. Ch. Pr. 220, 221.

(*y*) *Foley* v. *Burnett*, 1 Bro. C. C. 279; 1 Mad. Ch. Pr. 220; 2 Bla. Com. by Chitty, 398, in notes.

(*z*) See in general, Eden, 300; 1 Mad. Ch. Pr. 160, 224.

(*a*) 1 Chan. R. 257; 2 Bla. C. 513, in notes; *Hathornthwaite* v. *Russell*, 2 Atk. 126; *Taylor* v. *Allen*, Id. 213; *Mansfield* v. *Shaw*, 3 Mad. 100; Chit. Eq. Dig. 1037; *Scott* v. *Becher*, 4 Price, 346; 1 Ch. Ca. 75.

(*b*) *Rogers* v. *Rogers*, 1 Anst. 174.

(*c*) *Otley* v. *Limes*, 7 Price, 274.

(*d*) *Ullerson* v. *Mann*, 4 Bro. C. C. 277; *Elmslie* v. *Macauly*, 3 Bro. C. C. 624.

(*e*) *Howard* v. *Passera*, 1 Mad. Rep. 142; Eden, Inj. 300.

(*f*) *Rothwell* v. *Rothwell*, 2 Sim. & Stu. 218.

(*g*) Id. ibid.

(*h*) *Ante*, 552; *Archbp. Canterbury* v. *Tuffen*, 8 Bar. & Cres. 150; and *Archbp. Canterbury* v. *Robertson*, Exchequer, 22 April, 1833, Easter Term, where the court took time to consider. See the result of that case stated in the *Addenda* at the end of the second volume.

11. Bill and injunction as to *Ships*. (i)

11. An injunction may be obtained to restrain the *Sailing of a Ship* in some cases, as between *Part Owners*. (k). But the Court of Chancery will not restrain the sailing of a vessel containing goods sold to a person who had become insolvent, and over which the plaintiff retained a right of *stoppage in transitu*, which he might exercise himself. (l) The Court of Admiralty is open all the year round to applications by a part owner, whose share is fixed and certain, to arrest and detain and restrain the sailing of a ship without his consent, until security by bond be given to the amount of his share; (m) and if the ship should be lost, the payment of the stipulated sum into court may be immediately enforced. (n) But a part owner cannot originate a suit for an *account* in the Court of Admiralty. (o) The Court of Chancery, especially where the shares are not ascertained, will exercise a *concurrent jurisdiction* by injunction to restrain the sailing of a ship until the share of the party complaining shall have been ascertained, and security given to the amount of it; and it will be referred to the master to make the inquiry and to settle the security accordingly. (p) But where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the plaintiff's delay in applying, the court refused an injunction to restrain the sailing of a ship upon the application of a part owner. (q) It seems that the jurisdiction of the Court of Admiralty, in cases of disputes between part owners of a ship, has been much narrowed by construction, and that a part owner cannot originate a suit there for an account; and that consequently an application to a Court of Equity by a part owner is preferable to proceedings in the Admiralty. (r) In a recent case, a very experienced and learned civilian, on being consulted as to the propriety of taking proceedings in the Admiralty Court on behalf of a half owner, an infant, against his co-owner, (who had rendered false accounts, and received the profits,) to stay the vessel from proceeding on her then voyage to Hamburgh, *advised*, "that proceedings in the Admiralty Court were not in that case expedient, because as such

(i) See in general 1 Mad. Ch. Pr. 163.

(k) Chit. Eq. Dig. titles, Ship, Jurisdiction and Practice, Injunction, xx., Eden's Inj. 297, 298. See the practice in the Court of Admiralty, *Case of the Apollo*, 1 Haggard's Rep. 306.

(l) *Goodhart* v. *Lowe*, 2 Jac. & W. 349.

(m) *Case of the Apollo*, 1 Hagg. 306.

(n) Id. ibid.; Abbott, Part I. c. 3, s. 4; Holt on Ships, 202, 2 ed.

(o) *Case Apollo*, 1 Hagg. Rep. 310, 313.

(p) *Haly* v. *Goodwin*, 2 Mer. 77. From the report of the case of the Apollo, 1 Hagg. 307, it appears that an injunction may be obtained in five days. It should seem from the observations in the *case Apollo*, 1 Hagg. 317, 318, that if one part owner should injure the other by prejudicial reports relative to the state of a ship, the remedy would not be in the Court of Admiralty.

(q) *Christie* v. *Craig*, 2 Meriv. 137.

(r) See *Apollo*, 1 Hagg. R. 306 to 320.

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proceedings were usually against vessels employed upon very *long* or *dangerous* voyages; and as the vessel in that particular case was employed only in a continuation of *short* voyages to Hamburgh, it would be useless to apply to the court for security on one such voyage, which security would be vacated as soon as that voyage should be completed; and it might be necessary to apply for other security on each succeeding voyage, and that it appeared to him that the court could not compel security in anticipation of *future* voyages being taken; and even then, the risk being small and expenses of such application great, no good would be obtained." Whereupon a bill in Chancery was filed, stating all the facts, and charging that the defendant had received all profits, and was insolvent, &c., and praying *inter alia* an account, and paying off complainant's just share, and a sale of his moiety in case a master should certify that it was for the infant's benefit; and that the defendant might be restrained from selling or incumbering the vessel, or at least complainant's moiety; "and that he, his servants and agents, might in like manner be restrained from removing or causing to be removed or taken away from the jurisdiction of the court the said ship or vessel until the further order of the court; and that the defendant might be decreed to deliver up the bill of sale of plaintiff's moiety, and that proper accounts might be taken, and all proper inquiries made, and all proper directions given for effectuating the purposes aforesaid, plaintiff submitting to account and do that which to the court should seem just, and for further relief." (*s*)

12. Injunctions against infringement of *Copyrights* and *Patents*, and rights of that nature. (*t*)

12. The prevention by injunction of *Piracies*, or imitations of a *Copyright* in books or music, busts and sculptures, engravings and prints, patterns for printing linens, cottons, and muslins, and of *Patents* of various descriptions, is one of the most common branches of jurisdiction of a Court of Equity. The various statutes for the protection of those several inventions usually give a penalty and an action at law for certain actually completed and *specified injuries* to those rights. (*u*) And although the acts are silent as to the interference of Courts of Equity, yet those courts will interfere *summarily* in protection of the legal right, for otherwise an injury might be committed with

(*s*) *Steinhauser*, (*an infant*, *&c.*) v. *Louder*, bill filed August, 1832.

(*t*) See in general 1 Mad. Ch. Pr. 137, 149; Chit. Eq. Dig. tit. Copyright, 248, and tit. Practice, Injunction, xv., 1054; and *Hill* v. *Thompson*, 3 Meriv. 622; Eden, 260, 261.

(*u*) See statutes, Chit. Col. Stat. 181 to 198, and notes. Besides the specified injuries and remedies in the statutes, it should seem that provided the statute *right* can be established, then the *common law* would also provide a remedy for any *other* injury, though not specified in the acts, see *Beckford* v. *Hood*, 7 Term Rep. 628.

impunity, or the party might have to seek redress against a mere pauper. And a Court of Equity will even restrain a *theatrical representation* of a tragedy or play, the copyright of which is vested in the complainant, although the statutes only provide for a *particular injury*, viz. the *publishing* or *selling* a similar *book*. (*v*) Where there has been a length of exclusive enjoyment under a patent, the court will grant an injunction in the first instance without previously putting the party to establish his right by an action at law; but otherwise where the patent is recent, or the piracy or imitation has been doubtful. (*x*) In the latter case the court will direct an issue or action; and after the patent right and piracy have been established, an injunction may be obtained, and an account taken of the extent of the defendant's piratical sales and profits. (*y*)

A Court of Equity will also interfere to protect a *Copyright* in a book from piracy on the behalf of a party who appears to have a good *equitable* title, even though it should not appear that his *legal* title is complete. (*z*) But this Court will not protect a foreigner's copyright. (*a*)

Where the party has suffered considerable time to elapse, after he had knowledge of the infringement of the right, before he applies to the court, he will not obtain an injunction until after a trial at law; (*b*) nor will the court grant an injunction before trial, pending the construction of the effect of an agreement not under seal, (*c*) though it should seem it would be otherwise in case of a covenant. (*d*)

Sometimes, although an injunction may be refused in the first instance, yet the court will direct the defendant to keep and be prepared to render an account of his sales between the time of the application and the final hearing and decree, so that the party complaining may have evidence of the measure of damage to be recovered. (*e*)

(*v*) *Morris* v. *Kelly*, 1 Jac. & Walk. 481; and *Johanning* v. *Hawkes*, 20 Feb. A. D. 1830; Tomkins's Temple Solicitor, MS. *contra* to *Coleman* v. *Walker*, 5 Term R. 245.

(*x*) *Hill* v. *Thompson*, 3 Meriv. 622; *Harmer* v. *Planc*, 14 Ves. 130; *Tonson* v. *Walker*, 3 Swanst. 672.

(*y*) Vice-Chancellor's Court, Thursday, Feb. 21, 1833. *Jones* v. *Pearse*. Mr. Knight *obtained an injunction* in this case on the part of the plaintiff. The bill had been filed to restrain the defendant from imitating certain iron wheels, for which invention the plaintiff had obtained a patent, and which he alleged had been infringed by the defendant. The Vice-Chancellor, on a former application, feeling doubtful as to whether the wheels manufactured by the defendant were an infringement of the plaintiff's patent, directed an issue at common law. An action had accordingly been brought, and a verdict obtained by the plaintiff. The court granted the injunction upon the present motion, and also directed an account to be taken of the wheels which had been manufactured by the defendant.

(*z*) *Mawman* v. *Tegg*, 2 Russ. 385.

(*a*) *Delondre* v. *Shaw*, 2 Sim. 237; *Platt* v. *Button*, Coop. 303; 19 Vesey, 447, S. C.

(*b*) *Platt* v. *Button*, 19 Ves. 447; *Southey* v. *Sherwood*, 2 Meriv. 435.

(*c*) *Walcot* v. *Walker*, 7 Ves. 1.

(*d*) *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1.

(*e*) *Wilkins* v. *Aikin*, 17 Ves. 422; 1 Mad. Ch. Pr. 15[illegible]

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Besides the reasons in favour of injunctions in general, (*f*) there is one particularly favourable to the application in the case of copyright. Adequate relief could not be given by any action for damages, for it is impossible to lay before a jury the whole evidence as to all the publications which go out to the world to the plaintiff's prejudice; and the sale of copies by the defendant is in such instance not only taking away the profit upon the individual book which the plaintiff probably would have sold, but may injure him to an incalculable extent, which no inquiry into the extent of damages can ascertain. (*g*)

With respect to *Letters*, we have seen (*h*) that no injunction to restrain their publication can be obtained on the ground that they are *libellous*, or that their publication would be painful to the feelings of the writer. (*h*) But when an injunction to restrain the publication of letters is granted, it is founded only on a right of property in the writer. (*h*) Where letters written by the plaintiff to the defendant having been returned by him, with a declaration that the latter did not consider himself entitled to retain them, the publication of copies taken before the return, without the knowledge of the plaintiff, was restrained by injunction, though represented by the defendant as necessary for the vindication of his character. (*h*) And it has been held that in general the sending of a letter bearing the character of a literary composition, does not give the person to whom it is transmitted the right to publish it for his own benefit, unless it be clearly essential to vindicate his character from false imputations cast upon him by the writer; (*i*) and an injunction on the application of an executor was granted to restrain the publication of letters written by his testator; (*k*) and against an executor to restrain him from publishing letters to his testator; (*l*) and it has been laid down as a general rule that a receiver of letters has at most but a joint property with the writer, and possession does not give him license to publish them; (*m*) and it further appears that an injunction will be granted to restrain the printing of an unpublished manuscript, a copy of which had been, by the representation of the author, given to a person under whom the defendant claimed, but not with the intention that he should publish it. (*n*)

(*f*) *Ante*, 693, 697; *Hogg* v. *Kirby*, 8 Ves. 225; *Wilkins* v. *Aikin*, 17 Ves. 424; Eden, 264; 1 Mad. Ch. Pr. 150.

(*g*) *Ante*, 696, 697; *Hogg* v. *Kirby*, 8 Ves. 225; *Wilkins* v. *Aikin*, 17 Ves. 424; Eden, 264; 1 Mad. Ch. Pr. 150.

(*h*) *Ante*, 697; and see in general 1 Mad. Ch. Pr. 151, 152, and *Gee* v. *Pritchard*, 2 Swanst. 403; Eden, 276 to 279.

(*i*) *Lord Percival* v. *Phipps*, 2 Ves. & B. 19; *Pope* v. *Curl*, 2 Atk. 342.

(*k*) *Granard* v. *Dunkin*, 1 Ball & B. 207.

(*l*) *Thompson* v. *Stanhope*, Ambler, 737.

(*m*) *Pope* v. *Curl*, 2 Atk. 342.

(*n*) *Duke of Queensberry* v. *Shebbeare*, 2 Eden, 329.

Where an author, having sold the copyright of a work, published under his own name, and covenanted with the purchaser not to publish any other work to prejudice the sale of it, it should seem that another publisher, who had no notice of this covenant, would be restrained from publishing a work, subsequently purchased from the same author and published under his name on the same subject, and though there is no piracy of the first work.(o)

In order to obtain an injunction against the violation of a patent, the party must swear to his belief at the time of applying that he is the original inventor.(p) Where there has been a length of exclusive enjoyment under a patent, the Court of Chancery will grant an injunction in the first instance without previously putting the party to establish his right by an action at law; but where the patent is recent and the injunction is opposed, by endeavouring to show that there is no good specification or is otherwise defective, the court will require the patentee to establish the validity of his patent in a court of law before it will grant him an injunction,(p) sometimes will direct an issue, and at other times leave him to his action; sometimes also directing an account of sales and profits in the meantime.

To restrain other imitations.

It has been laid down that an injunction will not lie to restrain one trader from making use of the same mark with another.(q) But in a late case an injunction was granted by the Vice-Chancellor to restrain the defendant from sending to Constantinople certain watches with the word "*Pesendede*," in Turkish characters, (meaning "*warranted*,") in imitation of the watches of the plaintiff, by which they had for very many years been distinguished, and by which he had obtained great credit in the Turkish trade.(r) And there are other cases where although the plaintiff may not have obtained a patent, yet he may obtain an injunction against a breach of confidence or trust in disclosing the secret of his invention.(s)

III. Bills of injunction, &c. relating to *Real Property*.

III. The proceedings in equity to *prevent* injuries to *Real Property* are principally,—1. *Boundary Bills*. 2. Injunctions to

(o) *Burfield* v. *Nicholson*, 2 Sim. & Stu. 1.

(p) *Thompson* v. *Hill*, 3 Meriv. 624.

(q) *Blanchard* v. *Hill*, 2 Atk. 484; 1 Mad. Ch. Pr. 163.

(r) *Gout* v. *Aleploglu and others*, Vice-Chancellor's Court, Easter Term, 1833.

(s) *Yovat* v. *Wingard*, 1 Jac. & Walk. 394; and see Chit. Eq. Dig. 1053.

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prevent Wasteful Trespasses or Disturbances of Franchises. 3. Injunctions to compel the Exercise of Lawful Works in the least injurious manner. 4. Injunctions to Quiet Possession after recovery at law; and 5. Injunctions to prevent Waste.

1. Bills to preserve *Boundaries.* (*t*)

1. We have before adverted to the importance of securing evidence of *Boundaries* between different estates, and especially between freehold and copyhold property. (*t*) An agreement between two owners to take measures to ascertain the correct boundary is binding without any other consideration than the mutual agreement. A Court of Equity will in general, upon a bill filed, issue a commission for the purpose of fixing the boundary, and thereby *preventing* future disputes and litigation, and to fix the value, if the ancient boundary cannot be ascertained, especially where lands have been intermixed by unity of possession. (*u*) So to distinguish copyhold from freehold lands within the manor, (*x*) and a tenant is bound to preserve the boundaries of his landlord distinct, and if by his default they become confused, he must substitute land of equal value, to be ascertained by commissioners. (*y*) Boundaries also are frequently ascertained in an action or issue at law under an inclosure act or by the direction of the court. (*z*)

2. To prevent *Wasteful Trespasses* or *disturbances of a franchise,* &c. (*a*)

2. With respect to *Real* property, injunctions may be obtained to prevent *wasteful trespasses; to quiet possession;* to prevent *waste,* or *private or public nuisances.* (*a*)

If a person either forcibly or wrongfully gets into or retains possession of land or other tenements, and is digging mines or committing *Wasteful Trespasses or irreparable Damages,* although the owner may be entitled to retake possession if he can do so without committing a breach of the peace, (*b*) or may be entitled to relief by summary proceedings before a magistrate, under the statutes against forcible entries and retainers, or may sue all the parties in an action of trespass; yet cases may occur where the wrong-doer has too many assistants to resist a retaking by peaceable means, or where magistrates will refuse to act, and

(*t*) See in general, *ante,* 195, 196, 237, 455; and see Chit. Eq. Dig. tit. Boundary Bill; 3 Bla. C. 426, b. in note 1; *Willis* v. *Parkinson,* 2 Meriv. 507; 1 Madd. Ch. Pr. 29, 30; 1 Fonbl. Treat. Eq. 22; 1 Thomas's Co. Lit. 701, note, 55.

(*u*) *Willis* v. *Parkinson,* 2 Meriv. 507; 1 Swanst. 9, S. C.

(*x*) *Duke of Leeds* v. *Earl of Strafford,* 4 Ves. 180.

(*y*) *Attorney General* v. *Fullerton,* 2 Ves. & B. 263.

(*z*) *Cranmer* v. *Pennington,* 5 Taunt. 167; *Hetherington* v. *Vane,* 4 Bar. & Ald. 428.

(*a*) See in general 1 Mad. Ch. Pr. 147; Chit. Eq. Dig. Practice, xlvi., 22, page 1058; 1 Eden, Inj. 192 to 196.

(*b*) *Ante,* 646.

where the wrong-doers being paupers the ultimate remedy by ejectment and action for damages, will be either insufficient or ineffectual, and the estate in the meantime may be ruined. In any such case the proper course is to file a bill in Chancery, stating all the circumstances, and immediately afterwards to file affidavits of the facts, and thereupon by counsel move the Chancellor or Vice-Chancellor *ex parte* for an injunction, which will, upon sufficient ground, be granted, thereby restraining the wrong-doer, his agents, servants and workmen, and every person claiming or pretending to claim through or under the wrong-doer from interfering or intermeddling with the premises, mines, &c. and from entering upon the same; and if after such injunction and before it has been dissolved any party should violate the same, process of contempt will immediately issue to take all parties so offending into custody. (*b*) In a late case *A. B.* in February, 1830, entered into an agreement to sell certain mines and premises to *C. D.*, the purchase money to be paid by instalments, and *C. D.* was let into possession, and paid one instalment and became bankrupt, but his assignees did not interfere with the estate, and thereupon *A. B.* unadvisedly distrained and sold coals towards payment of the purchase money, but afterwards the residue remaining unpaid *A. B.* took possession and let to *E. F.*, who worked the same for some time, and thereupon *C. D.* re-entered and took up tram-roads and destroyed an engine, and afterwards took forcible possession and worked the mines until 9th August, 1832; and *A. B.* in vain attempted to retake possession, and the magistrates, on account of the distress and cross claim of right, refused to interfere, as well under the statutes against forcible entries and detainers as under 7 & 8 Geo. 4, c. 30, and thereupon *A. B.* filed his bill in chancery on 13th August, 1832, in the name of himself and said *E. F.* his tenant against said *C. D.* and another, and made affidavits sworn on 20th August, and filed on 22d. The Chancellor doubted whether it was a fit case for relief, as it would encourage application to that court in all cases where the proper remedy was an action of trespass. (*c*) But as he was going out of town, suggested that the

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(*b*) Formerly the exercise of this jurisdiction was denied, but now it is common in case of continuing trespass irreparable or very injurious, Eden, 192 to 196. But it is said that where the defendant being a mere stranger might be turned out of possession immediately, an injunction does not lie, *Mortimer* v. *Cottrell*, 2 Cox, 205; 1 Mad. Ch. Pr. 148; see further Redesd. Tr. Pl. 110; 3d ed. 1 Mad. Ch. Pr. 253, n. (*s*), and (*t*); *Smith* v. *Collyer*, 8 Ves. 90, and 9 Ves. 291.

(*c*) *Ex parte* Clegg, 23 Aug. 1832. The bill fully stated the fact as above abstracted, and concluded with the following prayer:—

"[That the said *C. D.* and *J. H.* their and each of their agents, servants and workmen, and every person claiming or pretending to claim by, from, through or under the said *C. D.* may be restrained by the order or injunction of this Honourable Court from

plaintiff might apply to the Vice-Chancellor, and who, on motion on 23d August, A. D. 1832, ordered an injunction to issue in the terms prayed. (*d*) And a proceeding of this nature will not prejudice a subsequent proceeding by ejectment and by action of trespass for prior or subsequent damages. (*e*)

This practice of the Court of Chancery to grant injunctions against trespasses likely to be continued, and to occasion considerable damages, seems to be well established; (*f*) and as the ground of gardens, parks, paddocks, courts and yards, are excepted in the power given under the highway act to widen, enlarge or divert roads, an injunction may be obtained to prevent justices from taking any part of a garden, &c. for either of those purposes; (*g*) but it will not be granted for a mere temporary or trifling trespass. (*h*) If a lord of a manor inclose, and the commoner break down fences, an injunction will be granted to prevent further pulling down fences till an issue upon the sufficiency of common has been tried; (*i*) and where sequestrators were forcibly dispossessed the court restored possession by injunction. (*k*)

Injunction to prevent disturbance of a *Franchise* or exclusive *Privilege*.

So where a party can by bill and affidavit establish a strong *primâ facie* exclusive right to a *Franchise or Privilege*, as an ancient ferry, or exclusive landing-place for goods, and such

interfering or intermeddling with the said colliery and premises, mines, beds, veins and seams of coal or any other mineral, or part thereof, and from entering upon and working the said colliery, mines, beds, veins and seams of coal or other mineral, or any part thereof, and from doing any spoil, damage or injury thereto, or to any part thereof or to the said premises, and from selling or disposing of any coals or other minerals already got, or which may be at any time got from the said colliery, or the mines, beds, veins and seams of coals, or other minerals, or any part thereof, and from doing any act, matter and thing to impede or interrupt plaintiffs, their agents, servants or workmen in working the said colliery and premises.] * And that an account may be taken by and under the decree and direction of this Honourable Court of the several quantities of coal or other minerals, which have been sold and removed from off the said colliery and premises since the said *C. D.* last took possession thereof as aforesaid, and of the several sums of money received by him, or by any person or persons by his order, or for his use on account thereof, and that he may be decreed to account for and pay to plaintiff *J. C.* such sums as shall be found to have been received by him on account thereof; and that he may be decreed to deliver up the peaceable and quiet possession of the said colliery and premises to plaintiff *J. C.* or as he shall direct; and that plaintiffs may have such further and such other relief in the premises as the nature and circumstances of the case may require, and as shall be agreeable to equity and good conscience, may it please your lordship, &c.

(*d*) *Casamajor* v. *Strode*, 1 S. & S. 381; and see *Newmarch* v. *Brandling*, 3 Swanst. 99, as to restraining a purchaser, who has not paid purchase money; *Crockford* v. *Alexander*, 15 Ves. J. 138; *Earl Cowper* v. *Baker*, 17 Ves. 128; *Grey* v. *Duke of Northumberland*, Id. 281; to prevent commissioners of highways entering gardens, &c. 1 Ves. 188.

(*e*) *Ante*, 731, note (c); *Attorney General* v. *Nichol*, 3 Meriv. 687.

(*f*) *Field* v. *Beaumont*, 1 Swanst. 208.

(*g*) 13 Geo. 3, c. 78, s. 16; Bell's Supplement, Ves. Sen. 105, and see what is a garden, &c.; *Gilbert* v. *Tomison*, 4 Dowl. & R. 222.

(*h*) *Coulson* v. *White*, 3 Atk. 21.

(*i*) *Arthington* v. *Fawkes*, 2 Vern. 356.

(*k*) *Lord Pelham* v. *Duke of Newcastle*, 3 Swanst. 289.

* The injunction only extended to the parts within the brackets.

right is threatened to be forcibly interfered with by others, an *ex parte* injunction may be obtained.(*l*)

3. Injunctions to compel the performance of lawful works in the least injurious manner.

3. So although parties may have a perfect legal right to perform some act upon or in relation to the real property of an individual, yet if they are about to execute their powers in a manner that would probably be more injurious than is necessary, and if the individual can suggest a preferable course of proceeding, a Court of Equity will by injunction enforce the latter.(*m*) Thus where a rail-way company, in exercise of the powers conferred upon them by an act of parliament, which gave compensation to persons whose property might sustain damage from their operations, were proceeding to erect an arch over a mill race, for the purpose of sustaining an embankment on which the rail-way was to be constructed, and it appeared that injury would thereby be done to the mill if the arch were of the proposed dimensions, but that the injury would be avoided if the arch were of certain larger dimensions, the Court of Chancery granted an injunction to restrain the company from making the arch of the proposed dimensions,

(*l*) In the Vice-Chancellor's Court, March, A.D. 1833, *Anderson* v. *Sullivan & others*, Mr. Knight made an *ex parte* application to the court, on behalf of the plaintiffs, for an injunction *to restrain the defendants from interfering with the exclusive privileges of the plaintiffs, or from interrupting or molesting them in the enjoyment of their exclusive right to land passengers and goods at the landing-place called Prince's Stairs,* situate upon the Prince Estate, in Rotherhithe, other than goods of the inhabitants residing on the estate, and also from plying for fares there. The circumstances of the case were these:—In the year 1812, Mr. Stott, to whom this property formerly belonged, let the use of the stairs upon a lease of 14 years, at 15 guineas per annum, to Pullman and other watermen licensed by the Trinity-house, who were tenants residing upon the estate, without any hinderance, except that all the inhabitants who reside upon the estate should have the privilege of landing goods without the payment of any wharfage. The lessees formed an association among themselves, allowing old members to retire, and any vacancies that might from time to time occur to be filled up. On the expiration of the lease, a renewal was given at an increased rent of 18 guineas a-year. The title to the freehold, after the death of Mr. Stott, was litigated, and the plaintiffs, who are ready and anxious to pay the rents to some one, filed the present bill for an injunction, for the protection of themselves. Several attempts having been made by various watermen on the Thames some time since to infringe upon the privilege of the plaintiffs, from the month of March, 1832, until the 11th of February last, the gates leading to the stairs were closed by the order of the plaintiffs. On the 11th ult. they were re-opened, and a notice posted at the stairs declaring them to be private property, and threatening all persons who interfered with the privileges of the tenants with a prosecution according to law. Notwithstanding this notice, ever since the opening of the gates vast crowds of unprivileged watermen had collected on the spot, and several of them had fastened their boats to the landing-place, declaring that unless they were permitted to land passengers they would prevent the plaintiffs from doing so, and also threatened to bring a multitude of other wherrymen to ply at the stairs, unless the plaintiffs would quietly submit to abandon their rights.

The application was made upon several affidavits, one of which was an echo of the bill, and the others particularizing in detail the various acts of aggression before alluded to.

The Vice-Chancellor thought a fit case had been made out for the immediate interference of the court, and directed an injunction to issue upon the production of two other affidavits, which had been alluded to by the counsel, before the rising of the court.

(*m*) *Coats* v. *Clarence Railway Company*, 1 Turner & Myl. 181.

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although the adopting the arch of larger dimensions would occasion more expense to the company.(*m*)

4. To *Quiet possession*, and *Bills of Peace*, &c. (*n*)

4. After recovery of a verdict at law or decree in equity, if the successful party still apprehend disturbance, he may, upon bill filed, obtain an injunction *to quiet him in possession;* (*o*) and a perpetual injunction has been granted after five trials at law on the same point and verdicts the same way; (*p*) and where many parties are interested, and at law it would be necessary to have numerous actions, a *bill of peace* may be filed so as to have all the rights settled in one issue. (*q*) But the general rule is, that a party must establish his right at law before he can bring a bill of peace; (*r*) and after a decree of land, the only proper mode for obtaining immediate possession is to obtain an injunction to deliver possession, which is of course on motion, and if not obeyed, a writ issues to the sheriff to deliver possession. (*s*) But bills of peace are now less in use than formerly, and they were confined to quieting the possession of corporeal hereditaments, and did not extend to the profits of an office. (*t*)

5. To prevent *Waste*.(*u*)

5. Bills and injunctions *to prevent Waste* are the most frequent and salutary proceedings in a Court of Equity. (*u*) In equitable as well as in legal waste, if a *threat* to commit waste, or one even small act of waste be established, the court will immediately, even in vacation, restrain equitable as well as legal waste generally; (*x*) and even upon threat, without an act done, or where a party insist on his right. (*y*) And although there would be a remedy at law, yet where the waste

(*m*) *Coats* v. *Clarence Railway Company*, 1 Turner & Myl. 181.

(*n*) See in general, Chit. Eq. Dig. xlvi. 19, 1057; Plead. 781; Eden's Inj. 363 to 366.

(*o*) Id. ibid. And in *Wickham* v. *South*, in Chancery, 23 April, 1833, Sir E. Sugden moved for an injunction to restrain the defendants from dredging for oysters, or destroying or injuring the oyster beds at Milton. The plaintiff was the owner of the beds, and the bill was in the nature of a bill to be quieted in the possession of the property in question, to which the plaintiff's right had been established by the trial of an action at law. The defendants were fishermen, and were very numerous. The Lord Chancellor granted the injunction, giving the defendants, at the same time, leave to move to dissolve the injunction before the Vice-Chancellor if they should be advised to attempt such a course. On 9th May following, the parties were brought into court *upon process of contempt*, and on their promise not to offend again were discharged by the Chancellor's order.

(*p*) *Countess of Gainsborough* v. *Gifford*, 2 P. W. 425; *Earl of Bath* v. *Sherwin*, 10 Mod. 1.

(*q*) 1 Mad. Ch. Pr. 166; 3 Bla. C. 427, in notes; and *post*, Chit. Eq. Dig. Pleading, xii, 781.

(*r*) *Dr. Lister, Holt's Case*, 2 Ves. sen. 193.

(*s*) *Huguenin* v. *Baseley*, 15 Ves. 180; *Sir W. Lewes* v. *Morgan*, 5 Price, 468.

(*t*) Eden's Inj. 332 to 334.

(*u*) See a useful note 3 Thomas's Co. Lit. 241, M. See in general, 1 Mad. Ch. Pr. 138; Chit. Eq. Dig. Waste and Practice, 1058.

(*x*) *Coffin* v. *Coffin*, 6 Mad. 17; *Barry* v. *Barry*, 1 Jac. & W. 653; 1 Mad. Ch. Pr. 138.

(*y*) *Gibson* v. *Smith*, 2 Atk. 182.

would be very injurious to the estate an injunction may be obtained, as to prevent digging contrary to a lessee's covenant.(z) So ploughing pasture lands long unploughed may be restrained, (a) and the cutting ornamental timber (b) even on behalf of a mere tenant. (c) So of underwood, if it be of insufficient growth; (d) removing valuable stone on sea-shore; (e) digging coals in a mine by a trespasser; (f) or against a tenant or under tenant from year to year, after notice to quit, from committing damage or removing crops, manure, &c. contrary to custom of country. (g) But we have seen that a Court of Equity will not interfere to prevent *permissive waste*, contrary to a covenant to repair, (h) or contrary to a covenant not to lop trees or carry off dung; (i) or not to plough pastures (*not ancient* meadows) if stipulated damages, (as 5*l.* per acre,) are to be paid for the breach. (j) The form of the writ of injunction is given in the note. (k) Without any bill having been filed and merely upon *petition* supported by *affidavit*, and even when the Chancellor is not sitting, he will, in urgent cases, to prevent waste, immediately issue his injunction. (l)

6. To prevent *Nuisances*, private or public. 1. Private.(m)

6. An injunction may be obtained against stopping *Ancient Windows* until trial of the right; (n) but the court will not on *mo-*

(z) *The City of London* v. *Pugh and others*, 4 Bro. P. C. 395; *Lord Grey* v. *Saxon*, 6 Ves. 106; *Drury* v. *Molins*, Id. 328; *ante*, 700.

(a) *Goring* v. *Goring*, 3 Swanst. 661.

(b) *Marquis of Downshire* v. *Sandys*, 6 Ves. 107, 110; *Lord Tamworth* v. *Lord Ferrers*, Id. 419; *Williams* v. *M'Namara*, 8 Ves. 70; *Day* v. *Merritt*, 16 Ves. 375.

(c) *Jackson* v. *Cator*, 5 Ves. 688.

(d) *Bridges* v. *Stephens*, 6 Madd. 279.

(e) *Earl Cowper* v. *Baker*, 17 Ves. 128.

(f) *Grey* v. *Duke of Northumberland*, 17 Ves. 281; *ante*, 723.

(g) *Onslow* v. ——, 16 Ves. 173; *Farrant* v. *Lovel*, 3 Atk. 723.

(h) *Ante*, 714, n. (k), and (l).

(i) *Rayner* v. *Stone*, 2 Eden, 128; *Johnson* v. *Goldswaine*, 3 Anstr. 749; sed vide *Webb* v. *Clark*, 1 Fonbl. Eq. 142; Newl. Contr. 313.

(j) *Rolfe* v. *Paterson*, 2 Bro. C. C. 426; but a mere clause of forfeiture would be otherwise, *Barrett* v. *Blagrave*, 5 Ves. 555.

Writ of injunction to stay cutting of trees or other waste.*

(k) William the Fourth, &c. To *A. B.* and his workmen, labourers, servants, and agents, and each and every of them, greeting: Whereas it hath been represented unto us in our Court of Chancery, in a certain cause there depending, wherein *C. D.* is complainant and you the said *A. B.* are defendant, on the part of the said complainant, that, &c. (*as in the order.*) We therefore in consideration of the premises aforesaid do strictly enjoin and command you the said *A. B.* and your workmen, labourers, servants and agents, and all and every one of you, under the penalty of one thousand pounds, to be levied upon your and each and every of your lands, goods and chattels, to our use, that you and every of you do from henceforth altogether absolutely desist from felling or cutting down any timber or other trees standing, growing or being in or upon the premises in question, or from committing or doing any other or further waste or spoil in or upon the said premises, or any part thereof, until our said court shall make other order to the contrary. Witness, &c.

(l) 1 New Ch. Pr. 234; *ante*, 700, n. (x).

(m) See Eden's Injunction, 231 to 238; 1 Mad. Ch. Pr. 155 to 157.

(n) At *law*, a person may in a peaceable and proper manner abate or remove

* Eden's Injunctions, 375, where see several other forms; and see fully 3 Thomas's Co. Lit. 243, 244, and notes.

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tion make an adverse order to *pull down* what has been done; (*o*) therefore when an injunction is apprehended, it is the practice to work even all night to complete the building before the injunction can be obtained, and before the actual obtaining or service of which the parties would not be in contempt. The court will grant an injunction before answer for a plain apparent nuisance, on a certificate, affidavit and notice to the party, his clerk in court, or solicitor; but in case of a special nuisance, the court expects the party to show his right, and how he is particularly aggrieved, before the writ can be granted. (*p*) And an injunction was granted *ex parte* to restrain the owner of a house from making any erections or improvements, so as materially to darken or obstruct the ancient lights or windows of an adjoining house. (*q*) But if the nature of the alleged injury do not require preventive interposition before a trial at law, and the legal right be doubtful, (*r*) or if the damage would not be very material or adequately compensated by the payment of damages, (*s*) or the obstruction will only partially affect the light, (*t*) or the party complaining has delayed applying for relief a considerable time, as three years, (*u*) an injunction will not be granted before a trial at law. In a late case, an injunction to restrain the obstruction of ancient lights was refused, the nature of the alleged injury not requiring preventive interposition before a trial, and the legal right being doubtful; and the Master of the Rolls observed, that the injury of postponing a building which the party might be entitled to erect, may not in every instance be equal to the injury of permitting him to proceed with one which is a nuisance; cases arise in which a Court of Equity, seeing that the injury might be irreparable, as where loss of health, loss of trade, destruction of the means of existence, might ensue from erecting a building, would exercise its jurisdiction of preventing injury, without waiting the slow process of establishing the legal right, when delay would be itself a wrong; on the other hand, it may be perfectly clear

a *private* nuisance, (*ante*, 647,) or he may bring repeated actions for every continuance. But there is not at law any writ *de nocumento amovendi* to remove a private nuisance, as upon a judgment against a public nuisance. In cases therefore where a party could not himself, or with the assistance of others, abate a private nuisance, his only direct course of proceeding to get rid of it seems to be in a Court of Equity.

(*o*) *Ryder* v. *Bentham*, 2 Ves. 533. See a *negative injunction not to permit to remain*; *ante*, 714, n. (*i*).

(*p*) Hind's Ch. Pr. 591.

(*q*) *Back* v. *Stacy*, 2 Russ. 121.

(*r*) *Wynstanley* v. *Lee*, 2 Swanst. 333; *Fishmongers' Co.* v. *East I. Co.*, 1 Dickens, 165.

(*s*) *Attorney-General* v. *Nichol*, 16 Ves. 333.

(*t*) *Morris* v. *Lessees Berkely*, 2 Ves. 453; *Fishmongers' Co.* v. *E. I. Company*, Dick. 164.

(*u*) *Weller* v. *Smeaton*, 1 Cox's Ch. C. 102.

that the plaintiff is entitled to succeed in an action of trespass, and yet a Court of Equity will not interpose by injunction, the nature or degree of injury not being such as to require that extraordinary relief. (v) But the court, on dissolving the injunction, will impose terms on the defendant to remove the building, in case the verdict should establish that it is a nuisance. (v) Courts with reluctance grant injunctions to stay the working of collieries or mines, or restrain a man in the exercise of his trade, and will not usually grant it before answer. (w) A brewhouse is not considered to be necessarily a nuisance. (x)

Where a private nuisance has been erected, a temporary acquiescence will not prevent the interference of the court, (y) and after a verdict at law finding the nuisance, and not before, a Court of Equity, will cause it to be removed. (z) Where an ordinary current of water running to a mill has been illegally stopped, a Court of Equity will immediately afford relief, though in some cases such a complaint has been referred to the commissioners of sewers. (a)

2. Public Nuisances. (b)

2. The Court of King's Bench will not, except in certain peculiar cases, interfere by *prohibition*, mandamus, or otherwise, to restrain a public nuisance, but will refer the parties complaining to the ordinary remedy by indictment, though they certainly have jurisdiction; (c) and after conviction of a public continuing nuisance, the judgment is usually to pay a fine, and to prostrate or remove the nuisance, and a writ issues from the crown office to the sheriff to abate the same. (d) But the latter is not always essential or proper; thus where the building itself is unobjectionable, though some noxious trade has been carried on therein, there need be no judgment that the nuisance shall be abated; (e) and where only a part of an erection is complained of, judgment should be given to remove only that part which has been found injurious. (f) And in the case of steam engines, there is an express enactment to this

(v) Per Master of the Rolls in *Wynstanley* v. *Lee*, 2 Swanst. R. 335, 336.

(w) *Anonymous*, Ambl. 209; *Jackson* v. *Barnard*, Ridgw. 259.

(x) *Gorton* v. *Smart*, 1 S. & S. 66, 68.

(y) 2 Eq. Ab. 522.

(z) *Weller* v. *Smeaton*, 1 Cox, 102; *In re Sir Lister Holt*, 2 Ves. S. 193; *Swan* v. *Rogers*, Carey, 26.

(a) *Swan* v. *Rogers*, Carey, 26; but see 1 Bro. Ch. C. 588.

(b) See in general Chit. Eq. Dig. tit. Nuisance.

(c) *Rex* v. *Justices of Dorset*, 15 East, 594; *Rex* v. *Commissioners of Dean*, 2 Maule & S. 80; *Rex* v. *Corporation of Plymouth*, A. D. 1832, K. B.

(d) Bro. Ab. Nuisance, 49; *Rex* v. *Stead*, 8 T. R. 142; 1 Chit. Crim. L. 716; 3 Id. 575, 607, b.

(e) *Pappineau's Case*, 2 Stra. 686; 2 Sess. Ca. 34; *Rex* v. *Justices of Yorkshire*, 7 T. R. 467; Com. Dig. Indictment, N.

(f) *Rex* v. *Stead*, 8 T. R. 142.

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effect. (g) But on a prosecution in K. B. there can be no prostration until after judgment; there is, however, a summary remedy before what is termed an annoyance jury; and we have seen what acts may be justified in removing a dangerous building. (h) But a court of *equity* will frequently interfere, as when a defendant had taken several old houses which were empty as temporary warehouses for stowing sugar, in which he was depositing such quantities of sugar that two of the houses had actually fallen, and others were in the most imminent danger, Lord Rosslyn granted an injunction upon petition and affidavit; (i) and it should seem that the court would interfere to restrain the carrying on a noxious trade destructive to the health and comfort of the neighbourhood. (k) But where the effect of an injunction would be to stop a great trading concern, the jurisdiction is exercised with caution, and not *ex parte*, but after notice, with the opportunity of opposing by affidavit. (l) In general, manufactories, such as soap and black ash manufactories, sugar houses, brewhouses, or brick-kilns, have not been considered such nuisances in proper neighbourhoods as will be stopped in the first instance by injunction, but should be first tried; though the obstruction of highways or harbours may be stayed by injunction before trial; (m) and an injunction to restrain the building an inoculating hospital was refused, that not being considered as a nuisance. (n) But a nuisance by an offensive and unwholesome process in any trade will, after a trial and verdict that it is a nuisance, be ordered by a Court of Equity to be removed. (o)

Where there is a corning house to powder mills, from site, construction, &c., imminently dangerous to the neighbours and public, and likely to cause irreparable injury to property, though as a public nuisance it may be an object of prosecution by the attorney general, yet an injunction was granted, with directions for the speedy trial of an indictment, and preventing immediate danger in the mean time. (p)

And where there is an obstruction to a public river as the Thames, an injunction may be obtained, and continued until after trial of an indictment respecting its erection; (q) though

(g) 1 & 2 Geo. 4, c. 41, s. 2, 3; 3 Burn's J. Nuisance, 912, 913.
(h) *Ante*, 654, 655, n. (e).
(i) *Mayor of London* v. *Bolt*, 5 Ves. J. 129.
(k) Eden on Injunctions, 226.
(l) *Crowder* v. *Tinkler*, 19 Ves. 618.
(m) *Attorney-General* v. *Cleaver*, 18 Ves. 211, 220; see in general Eden, 226 to 231; and *Gorton* v. *Smith*, 1 S. & S 66 to 68.
(n) *Baines* v. *Baker*, Ambl. 158.
(o) *Attorney-General* v. *Cleaver*, 18 Ves. 211.
(p) *Crowder* v. *Tinkler*, 19 Ves. 617.
(q) 2 Wils. 87.

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in case of works by the commissioners of sewers, the court has refused to interfere on motion, stating it would be more proper to apply to the Court of King's Bench. (r) It is said to be usual, in case of public nuisance, to proceed by information at the suit of the attorney general, but that private individuals may apply to the court. (s) Where a Court of Equity has granted an injunction against the erection of a nuisance, the court will not on motion give leave to re-erect before the hearing of the cause, but will at most put the question of right in a speedy course of trial. (t)

Other Preventive Remedies connected with *suits*, but *antecedent* to the same.

Having thus enumerated the principal instances of *Preventive* remedies by *Injunction*, to protect the person or personal or real property in particular, there remain to be considered some preventive remedies in courts of justice, connected with suits, and of great practical importance. These are, principally, 1. Bills and writs of *ne exeat*, to prevent persons from leaving the kingdom to avoid payment of an equitable debt; 2. Bills to perpetuate testimony; 3. Bills to restrain or qualify actions in courts of law and other courts; and 4. Bills of interpleader. The first and second of these may be here properly considered as preventive remedies before any other suit. But bills to restrain actions at law or in other courts, bills of interpleader and motions of that nature, being respectively proceedings to be instituted after the commencement of action or suit, will be more properly arranged and considered in the chapter which treats of the proceedings to be taken by a *Defendant*, immediately after an action or suit has been commenced.

Bills and writs of *Ne Exeat* to prevent equitable debtors from quitting the kingdom. (u)

When there is a *legal* debt of £20 or upwards, and the creditor apprehends that his debtor will not be forthcoming at the end of the suit, he may, upon making an affidavit, cause him to be arrested and to remain in prison until he give security, with two bail, for the payment of the debt, or his rendering himself to prison upon the judgment when obtained, and in some cases of torts, although no certain debt can be sworn to, a judge will, upon special affidavit, showing that the wrongdoer is about to quit the kingdom, make an order to hold to bail for a sum fixed in the order. (x) But there are many

(r) Eden, 230.
(s) Id. ibid. 230, 231.
(t) *In re Sir Lister Holt*, 2 Ves. S. 193.
(u) See the history of the writ of *ne exeat* in part discussed in *Flack* v. *Holme*, 1 Jac. & W. 413 to 415.
(x) Tidd's Prac. 172, 9 ed.

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equitable and *ecclesiastical* claims, in respect of which either no proceedings can be had at law, or at least no arrest. (*x*) The Court of Chancery or the Master of the Rolls (*y*) therefore, will in these cases issue a writ of *ne exeat regno,* which requires the party to find sureties in the nature of equitable bail, that he will not quit the kingdom, (*z*) or go into Scotland or Ireland; (*a*) and this is extended also to common law debts, when they constitute matters of *account.* (*b*) This writ was originally issued to prevent attempts against the safety of the state, and to hinder persons from going abroad and communicating important intelligence to an enemy; but the Court of Chancery has gone on from more to more until at length it has assumed and established its present extensive jurisdiction under this act. (*c*)

A *Wife* may obtain a *ne exeat regno* for an arrear of alimony and costs, in aid of a decree or sentence of an ecclesiastical or spiritual court, (*d*) and perhaps before decree, pending proceedings, (*e*) but not pending an appeal from the decree. (*f*) But the *ne exeat* cannot be obtained upon affidavit of the wife, as her evidence against her husband is only admissible in cases of breach of peace. (*g*)

If a *Child* were grown up and about to leave the kingdom, even to Scotland, the chancellor may, by *ne exeat regno,* prevent him, and if gone, might, by great or privy seal, call on him to return, and if not obeyed, take his property. (*h*) So against husband and wife, *executrix* or *administratrix,* (*i*) but not by *feme* alone; (*j*) so it lies for a legatee against an executor, (*k*) and a surety may obtain this writ against his principal, although he is merely liable, and has not yet paid any thing in respect of his liability. (*l*)

The demand for which a *ne exeat* may be issued must in general *be equitable,* and not legal, excepting in the case of an account. (*m*) It must be completely due, and must be such a debt that the sum to be marked on the writ may be ascertain-

(*x*) *Swift* v. *Swift,* 1 Ball & Beatty, 327.
(*y*) *Boehm* v. *Wood,* 1 Turn. & R. 343.
(*z*) *Haffey* v. *Haffey,* 14 Ves. J. 261; *Shaftoe* v. *Shaftoe,* 7 Ves. 171, 173; see in general 2 Madd. Ch. Pr. 226; Chit. Eq. Dig. Husband and Wife, 522; and Id. Practice, Writ, iv. 1157.
(*a*) 2 Mad. Ch. Pr. 230.
(*b*) *Per* Lord Chancellor in *Flack* v. *Holme,* 1 Jac. & W. 413, and *post.*
(*c*) *Ante,* 731, note (*c*).
(*d*) *Shaftoe* v. *Shaftoe,* 7 Ves. 171, 173; Cases Chit. Eq. Dig. 522
(*e*) *Coglar* v. *Coglar,* 1 Ves. J. 94.
(*f*) *Boehm* v. *Wood,* 1 Turn. & Rus. 322.
(*g*) *Sedgwick* v. *Watkins, sed quære,* 1 Ves. J. 49; 3 Bro C. C. 11; *De Manneville* v. *De Manneville,* 10 Ves. 56, S.C.
(*h*) *De Manneville* v. *De Manneville,* 10 Ves. 63; Chit. Eq. Dig. 528.
(*i*) *Moore* v. *Hudson,* 6 Mad. 218.
(*j*) *Pannell* v. *Tayler,* 1 T. & R. 96.
(*k*) Chit. Eq. Dig. 1159.
(*l*) *Sealey* v. *Laird,* 3 Swanst. 368.
(*m*) *Swift* v. *Swift,* 1 Ball & B. 327.

ed. (n) But where the party was a factor or agent *to account*, and he usually reside abroad, this writ may issue, though he might have been held to bail at law for the balance of the account, (o) but not against a captain just before sailing, and after long delay. (p) It may be obtained by an Englishman against a foreigner who happens to be in this country, to enforce the adjustment of an account upon a foreign transaction, although, according to the law of that country, the foreigner could not there have been held to bail. (q)

The *affidavit* of a threat or intention to go abroad must be positive, not upon information and belief; (r) but the court acts on evidence of intention to go, without regard to denial; (s) and no notice of motion for the writ need be given, for that might defeat its object; (t) but a *bill* must be first filed. (u) The form of the writ of *ne exeat regno* is given in the notes. (x)

2. Bills to perpetuate testimony. (y)

2. Bills to *Perpetuate Testimony* are also in the nature of a preventive remedy to prevent loss of evidence in case of any *vested* interest, but which cannot be *immediately* litigated, because it is in remainder or reversion pending an estate for life, or years, or where the evidence will be important to *resist* a claim which may afterwerds be litigated; (y) but it has been

(n) *Boehm* v. *Wood*, 1 T. & R. 346; *Whitehouse* v. *Partridge*, 3 Swanst. 377.

(o) *Flack* v. *Holme*, 1 Jac. & W. 405; *Stewart* v. *Graham*, 19 Ves. 313; *Howden* v. *Rogers*, 1 Ves. & B. 129; *Jones* v. *Sampson*, 8 Ves. 593.

(p) *Dick* v. *Swinton*, 1 Ves. & B. 371.

(q) *Flack* v. *Holme*, 1 Jac. & W. 405; and see *De la Vega* v. *Vianna*, 1 Bar. & Adolph. 284, S. C. at law.

(r) *Amsinck* v. *Barklay*, 8 Ves. 597; *Jones* v. *Alephson*, 16 Ves. 470.

(s) *Whitehouse* v. *Partridge*, 3 Swanst. 375.

(t) *Collinson* v. ——, 18 Ves. 355.

(u) Beames, 26; 6 Ves. 92.

Writ of *ne exeat regno*.*

(x) William the Fourth, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, &c. To our Sheriff of Middlesex, greeting. Whereas it is represented to us, in our Chancery, on the part of *A. B.* complainant against *C. D.* defendant, (amongst other things) that he the said defendant is greatly indebted to the said complainant, and designs quickly to go into parts beyond the sea, (as by oath made in that behalf appears) which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do hereby command you, that you do, without delay, cause the said *C. D.* personally to come before you, and give sufficient bail or security in the sum of £ , that the said *C. D. will not go*, or attempt to go, into parts beyond the seas; without leave of our said court. And in case the said *C. D.* shall refuse to give such bail or security, then you are to commit him the said *C. D.* to our next prison, there to be kept in safe custody untill he shall do it of his own accord. And when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said Court of Chancery, distinctly and plainly, under your seal, together with this writ. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

(y) See in general Chit. Eq. Dig. Perpetuating Testimony, 590, 772, 782; 1 Mad. Ch. Pr. 185 to 196; 2 Mad. Ch. P. 250, 546, 547; and see 1 W. 4, c. 22; and *Angell* v. *Angell*, 1 Sim. & Stu. 83, 88, 89.

* Beames on *ne exeat regno*, 19.

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doubted whether Chancery has jurisdiction to entertain a bill to perpetuate testimony in case of a claim to a *Dignity*. (z) A bill of this description is proper whenever a person has a vested claim or defence, which by the death of a then living witness he might hereafter be unable to establish. (a) But the bill must always show that the party filing it *cannot immediately* bring his action, or compel his opponent to bring his action to try the right, or it will be demurrable. (b)

The witness expected to die must be old and infirm, and usually of the age of *seventy* years, (c) but there is an instance of a surviving witness to a will only *sixty* years old, but afflicted with the gravel and living in Virginia, having been examined under such a bill; (c) and it has been proceeded upon in other cases where there has been only one witness living. (d) But the defendant's costs of such a bill must be paid by the applicant. (e) It should seem, on principle, that when a claimant has no immediate power to commence a suit, or where a party would properly be defendant in any proceeding, and has no power to compel the creditor or claimant to sue immediately, he should be allowed immediately to examine witnesses conditionally, even when much younger than 70 years old. But this proceeding it is said, is not in general favored, and is considered as open to great objection. (*f*) The recent act, enabling the courts to examine witnesses on interrogatories, only applies when an action is actually *depending*, (g) nor can a commission to examine a witness be obtained in a Court of Equity until a suit in which he is to be examined has been actually commenced. (h)

We will postpone the consideration of bills to restrain proceedings at law and in other courts, and bills of interpleader, to the chapter in which will be stated the conduct to be adopted by a *Defendant* improperly sued.

IX. Preventions of loss in other particular cases.

IX. Besides these *preventive* measures, which it will be observed are of a *general* nature, there are some peculiar preventive measures of a limited or local nature, to which we shall

(z) *The Earl of Belfast* v. *Chichester*, 2 Jac. & W. 439.

(a) 1 Madd. Ch. Pr. 185 to 196.

(b) *Angell* v. *Angell*, 1 Sim. & Stu. 83. 89.

(c) *Fitzhugh* v. *Lee*, Ambl. 65.

(d) *Angell* v. *Angell*, 1 Sim. & Stu, 83. 88, 89.

(e) 1 Mad. Ch. Pr. 195.

(*f*) *Angell* v. *Angell*, 1 Sim. & Stu. 88. 89.

(g) 1 Wm. 4, c. 22.

(h) *Angell* v. *Angell*, 1 Sim. & Stu. 83, 88, 89.

merely advert, viz. *Protests for Better Security* and proceedings against a person who it is suspected is about to become a *Fugitive Debtor.* CHAP. VIII. PREVENTION OF INJURIES LEGALLY.

1. By the custom of the merchants, if the *drawee* of a foreign bill of exchange abscond before it is due, the holder may *protest it*, in order to obtain *better security* for the payment, and which is usually thereupon given by the drawer and indorsers.(*i*) But it may be collected, that although the drawer and indorsers should neglect or refuse to give any further security, the holder must, nevertheless, wait till the bill be due before he can sue either of those parties, though the refusal will be considered as an imputation on the mercantile conduct of the refusing party. (*k*) 1. Of Protests for better security

2. By the custom of London, if a creditor will swear, and cause others to swear that his debtor is about to *abscond*, or technically termed become *Fugitive*, he may, although the credit has not expired, arrest him, and compel him to find security. This proceeding is somewhat in the nature of a writ of *ne exeat regno*, which we have already considered. (*l*) 2. Of proceedings in London against a fugitive debtor.

(*i*) *Anon.* Lord Raym. 743; Mar. 27, 111, 114; Beawes, tit. Bills of Exchange, pl. 22, 24, 26, 27, 29. The following is an extract from the code of laws at Antwerp, relating to bills of exchange. "In the case of failure (*de faillité*) of the acceptor before the usance (*l'escheance*) the holder may cause it to be protested, and put in force his recourse."

(*k*) Beawes, pl. 26; Chitty on Bills, 8 ed. 374.

(*l*) As to this custom in general, see Emmerson's Pract. Mayor's Court, 62; *Horton* v. *Beckman*, 6 Term R. 760; *Smith* v. *Dr. Bourchier*, 2 Stra. 993; *Anonymous*, Lord Raym. 743; Ashley's Prac. Mayor's Court, and Bohun's Priv. Londini, and Norton's do.

CHAPTER IX.

OF THE STATUTES OF LIMITATIONS, AND OF THE CONSEQUENCES OF LACHES AND LAPSE OF TIME INDEPENDENTLY OF THOSE STATUTES.

1. Of the Statutes of Limitations.
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2. The peculiar Operation and Practical Application of each.
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         1. The Enactments.
         2. The Exceptions.
         3. When acknowledgment takes Case out of Statute.
         4. Presumption of Payment after 20 Years.
         5. Penal Actions.
         6. Actions against Justices, &c. &c.
      3. Construction of Time in general.
   2. In Courts of Equity.
      1. Construction of Statutes.
      2. Principles there in analogy to Decisions at Law.
      3. Pendency of a Bill, its operation.
      4. Of pleading Statute in Equity.
   3. In Bankruptcy.
   4. In Cases of Executors and Administrators.
   5. In Ecclesiastical and Spiritual Courts.
   6. Respecting Tithes.
   7. In Admiralty Courts.
   8. In Criminal Cases.
   9. Consequences of Laches or Delay, independently of the Statutes of Limitations.

WE are now to suppose that it is in vain to attempt *to prevent* the commission of the *injury*, and that it has actually been *completed*, whether a *breach of contract* or a *tort* unconnected with contract, and that the party injured is anxious to compel either *specific relief* or performance, by the delivery, or conveyance, or recovery of a chattel or real property, or other exact performance of the contract, or of recovering *damages* for the breach of contract or tort. But here a *preliminary inquiry* is essential, viz. whether all or some and what remedy may not have become barred by a *Statute of Limitations*, or by the established practice of all or a particular court. In some cases parties are allowed even *sixty years* and in others *not so many days*, and the enactments and rules upon this important subject should in regular order be considered in this chapter. As observed in Sugden's Vendor and Purchaser, sometimes these acts bar the *Right*, in others only the *Remedy;* (*a*) and in either case, as by lapse of time on one hand, the party originally entitled *loses* his right or remedy; so on the other hand, his opponent, by the same lapse of time, in effect *acquires a right or title* to an estate; though it is properly ob-

(*a*) Sugden, Vend. & P. 8th edit. 349; 764, note q; 766, note p.

served, that a *title* by mere lapse of time, being subject to many exceptions, is not a right upon which any purchaser should too readily rely. (*b*)

General object and outline of the provisions in the Statute of Limitations.

2. *Vigilantibus non dormientibus leges subservient* is a well-known maxim, reduced to certainty and practical utility either by the *statutes* passed for limiting the times within which legal proceedings must be commenced or by the practice of the court. The Statutes of Limitation principally relate to *Common Law* proceedings, (*c*) but some apply to Courts of *Equity*, (*d*) others to the Ecclesiastical and Spiritual Courts, (*e*) others to Courts of Admiralty, (*f*) and still more acts to proceedings for *Penalties* and small offences, and even some to *Criminal proceedings*, though in general there is no limitation of *Indictments*, a rule which will hereafter be fully considered. (*g*) A very numerous class of limitations also is that protecting *Justices of the peace* (*h*) and *Inferior Peace Officers and others*, acting in the supposed execution of the authority given by numerous modern acts, and who may have exceeded their powers.

Some of these Statutes of Limitations relating to *Real Actions* still allow even *sixty* years, (*i*) and others only *twenty*; (*k*) and as to personal actions, some *six* years, others *four*, others *two*; (*l*) and suits for tithes have recently been limited to *six years* (*m*). Suits in the Spiritual Courts for words must be commenced within *six calendar months*; (*n*) and suits in the same courts for fornication or incontinence, or striking or brawling in a church or church-yard, *eight calendar months*. (*o*) Actions on *penal* statutes, by an informer, *one year*, and by the king *two years*, from the expiration of such year. (*p*) And actions against justices and peace officers six calendar months; (*q*) against custom-house and excise officers three *lunar* months; (*r*) and various

(*b*) Sug. V. & P. 8th ed. 348 to 358.

(*c*) 32 Hen. 8, c. 2; 1 Mary, s. 2, c. 5; 31 Eliz. c. 5; 21 Jac. 1, c. 16; 4 & 5 Ann. c. 16; 24 Geo. 2, c. 44, s. 8; 9 Geo. 3, c. 16; 7 & 8 Geo. 4, c. 53, s. 115; 9 Geo. 4, c. 14; 2 & 3 Wm. 4, c. 71 & 100.

(*d*) 53 Geo. 3, c. 127, s. 5.

(*e*) 27 Geo. 3, c. 44; 53 Geo. 3, c. 127, s. 5.

(*f*) 4 & 5 Ann. c. 16, s. 17.

(*g*) *Dover* v. *Maestaer*, 5 Esp. R. 92; 1 Chit. Crim. L. 160. Motions for a criminal information must, by the practice of the Court of King's Bench, be made within a limited time, Tidd, 9th edit. 498, and *post*; after which time a prosecutor can only proceed by indictment.

(*h*) 24 Geo. 2, c. 44, &c. See the list of the principal acts, *post*, 738 to 740.

(*i*) 32 Hen. 8, c. 2.

(*k*) 21 Jac. 1, c. 16, as to *corporeal* hereditaments; and 2 & 3 Wm. 4, c. 71 & 100, as to *incorporeal*.

(*l*) 21 Jac. 1, c. 16; 9 Geo. 4, c. 14.

(*m*) 53 Geo. 3, c. 127, s. 5.

(*n*) 27 Geo. 3, c. 44, s. 1.

(*o*) Id. sect. 2.

(*p*) 31 Eliz. c. 5, *post*, 770.

(*q*) 24 Geo. 2, c. 44, s. 8.

(*r*) 28 Geo. 3, c. 37, s. 23; notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says calendar, see Tidd, 9th edit. 20, *sed quære*.

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other statutes contain other limitations, even to a few days, as appears by the following alphabetical table. And motions to set aside an *Award* in respect of any extrinsic objection must, in general, be made before the last day of the next term after it was made; (*s*) and in general a rule nisi for a *Criminal Information* against a magistrate, for misconduct in the execution of his office, ought to be moved for within the first term after the supposed offence. (*t*) Nor will a *Mandamus* in general be issued where there have been many years delay. (*u*) So in equity, *Bills for Specific Performance* must be instituted promptly and without slumbering on the right. (*w*) These few instances will suffice to evince the expediency for parties injured being *on the alert*, and for the absolute necessity of considering the time for taking proceedings in any court before actually embarking in litigation.

The principal Statutes of Limitations may, with reference to the actions and proceedings which they affect, be alphabetically arranged as follows:—

Alphabetical list of statutes of limitations.

Account, action of	6 years	21 Jac. 1, c. 16, s. 3.
Admiralty, suits for seamen's wages	6 years	4 Ann. c. 16, s. 17.
Annuity, action of, no limitation		10 Ves. 453; M'Clel. 495; Tidd, 9th ed. 15.
Army, navy, and marine officers, &c. actions against	6 lunar months	6 Geo. 4, c. 108, s. 97.
Assault, battery, and false imprisonment	4 years	21 Jac. 1, c. 16, s. 3.
Assignees, &c. in bankruptcy..	3 calendar months	6 Geo. 4, c. 16, s. 44; construction, 2 M. and P. 429; 8 B. & C. 697; 5 Bing. 276.
Assumpsit, action of	6 years	21 Jac. 1, c. 16, s. 3; 1 B. & Adolp. 15.
Award, motion to set aside, when	In next term after made	9 & 10 Wm. 3, c. 15, s. 2.
Bankrupt act, action against commissioners, &c.	3 calendar months	6 Geo. 4, c. 16, s. 44; 2 M. & P. 429; 8 B. & Cres. 697; 5 Bing. 276.
Bond or specialty, no statute of limitation, but presumption of payment after 20 years, when	20 years	2 Moore & P. 429; 8 Bar. & C. 697; 1 T. R. 270; Tidd. 18.
Building act................	3 calendar months	14 Geo. 3, c. 78, s. 100.
Case (except for words actionable in themselves)	6 years	21 Jac. 1, c. 16, s 3.
Commissioners of West India and London Dock Companies, &c. against	6 calendar months	39 Geo. 3, c. lxix. s. 184; 5 Taunt. 534; 39 & 40 Geo. 3, c. xlvii, s. 151; 1 R. & M. 161; 1 C. & P. 547; 2 C. & P. 264.
Commissioners, Brighton act, &c.	6 calendar months	6 Geo. 4, c. 179, s. 255; 6 Bing. 489.

(*s*) 8 & 9 Wm. 3, c. 15; see cases, post, *In re Burt*, 5 Bar. & Cres. 668; 8 D. & R. 421, S. C.

(*t*) Tidd, 9th edit. 408, and *post*.

(*u*) *Rex* v. *The Commissioners of Cockermouth Inclosure Act*, 1 Bar. & Adolp. 378.

(*w*) 1 Mad. Ch. Pr. 415, and *post*.

Company, Commercial Dock, &c.	6 calendar months	50 Geo. 3, c. ccvii. s. 94; 10 B. & C. 277; 1 B. & Adol. 277.
Constables, &c. see "Justices,"	6 calendar months	24 Geo. 2, c. 44, s. 8.
Covenant, see "Bond."		
Criminal conversation		
Criminal information against magistrates, usually	In next term	Tidd, 498.
Customs and excise officers, &c. actions against	3 lunar months	28 Geo. 3, c. 37, s. 23, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says calendar; Tidd, 20.
Debauching daughters, &c.	6 years	21 Jac. 1, c. 16, s. 3.
Debt (if not on specialty)	6 years	21 Jac. 1, c. 16, s. 3.
Debt on specialty, see "Bond."		
Debt, *qui tam*, see "Penal statutes."		
Deed, see "Bond."		
Detinue	6 years	21 Jac. 1, c. 16, s. 3.
Dock acts, see "Commissioners," &c. "Companies," &c.	6 calendar months	West India, 39 Geo. 3, c. 69, s. 184; 5 Taunt. 534.
Ditto, London Docks	6 calendar months	39 & 40 G. 3, c. xlvii. s. 151; 4 Man. & Ry. 130; 1 Ry. & M. 161; 1 Car. & P. 541.
Ecclesiastical courts—		
Suits for verbal defamations	6 calendar months	27 Geo. 3, c. 44.
For incontinence, brawling or striking in church, &c.	8 calendar months	Id. ibid.
Ejectment	20 years	21 Jac. 1, c. 16, s. 1.
Entry, writ of	30 years, &c.	32 Hen. 8, c. 2, s. 1, 2; 3 Bla. Com. 188.
Error, writ of	20 years	10 & 11 Wm. 3, c. 14; T. 1141.
Excise officers, actions against	3 *lunar* months	28 Geo. 3, c. 37, s. 23, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says *calendar*; T. 20.
False imprisonment, see "Assault,"	4 years	21 Jac. 1, c. 16, s. 3.
Fornication	8 calendar months	27 Geo. 3, c. 44.
Formedon	20 years	21 Jac. 1, c. 16, s. 1.
Game, proceedings for penalties	3 calendar months	2 & 3 Wm. 4, c. 32, s. 41.
——, actions against officers, &c.	6 calendar months	Id. ibid. s. 47.
Highway act	3 calendar months	13 Geo. 3, c. 78, s. 81; 1 B. & Adolp. 391.
Hundred	3 calendar months	7 & 8 Geo. 4, c. 31, s. 3; 4 Man. & Ry. 130; *ante*, 577.
Notice within	7 days	*Ante*, 578.
Imprisonment, see "Assault,"	4 years	21 Jac. 1, c. 16, s. 3.
Justices, constables, &c. actions against	6 calendar months	24 Geo. 2, c. 44, s. 8; Tidd, 19; Chit. Col. Stat. 650.
Larceny act, actions for illegal apprehensions, &c.	6 calendar months	7 & 8 Geo. 4, c. 29, s. 75.
Legacies, presumptive payment	20 years	2 Mad. Ch. Pr. 5.
Libels	6 years	21 Jac. 1, c. 16, s. 3.
London police act	6 calendar months	10 Geo. 4, c. 44, s. 41.
Malicious injuries, actions for illegal apprehensions, &c.	6 calendar months	7 & 8 Geo. 4, c. 30, s. 24, 41 5 Bing. 336.
Metropolis act	3 calendar months	57 Geo. 3, c. 29, s. 126; Bing. 429.
Navy, see "Army,"	6 lunar months	6 Geo. 4, c. 108, s. 97.
Penal statutes by common informer	1 year	31 Eliz. c. 5; Tidd, 14; Wils. 250; 2 Bla. R. 792.
Penal statutes, by king	2 years	31 Eliz. c. 5; Tidd, 14; *post*, 770
Prescription	20 years, &c.	2 & 3 Wm. 4, c. 71; *post*, 745, notes

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Qui Tam, see "Penal statutes."		
Quit rent	No presumption against	Cowp. 214; *ante*, 228.
Rent charge, no statute of limitation, see "Bond,"		T. 15; 10 Ves. 453; M'Clel. 495; *post*.
Replevin	6 years	21 Jac. 1, c. 16, s. 3.
Right, writ of	60 years	32 Hen. 8, c. 2.
Scire facias, no statute of limitation		Tidd, 16, 18, 1105, 1106; 2 Bla. R. 995.
Seamen's wages	6 years	4 Ann. c. 16, s. 17; Tidd, 16.
Servant, debauching, see "Debauching daughter."		
Slander, verbal (unless special damage, Sid. 95)	2 years	21 Jac. 1, c. 16, s. 3.
Slander, written, see "Libel,"	6 years	Id. ibid.
Slander, verbal, Ecclesiastical court	6 calendar months	27 Geo. 3, c. 44.
Specialties, see "Bond."		
Spiritual Courts, see "Ecclesiastical Courts,"	6 or 8 cal. months	Id. ibid.
Taxes, actions against officers	6 calendar months	43 Geo. 3, c. 99, s. 70.
Tithe, not setting out, or suits for	6 years	53 Geo. 3, c. 127, s. 5; Cro. Car. 513.
Trespass (except assault, battery, wounding, or false imprisonment)	6 years	21 Jac. 1, c. 16, s. 3.
Trover	6 years	Id. ibid.; 5 B. & Cres. 149.
Turnpike act	3 calendar months	13 Geo. 3, c. 84, s. 85, &c.; Tidd, 21.
Vagrant act	3 calendar months	5 Geo. 3, c. 83, s. 18.
Words, see "Slander,"	2 years	21 Jac. 1, c. 16, s. 3.
Wounding, see "Assault,"	4 years	Id. ibid.
Wages, seamen, Admiralty	6 years	4 Ann. c. 16, s. 3.

All acts of this nature have been emphatically termed *statutes of repose*, and being all *in pari materia* and passed with the same object, they ought all to be liberally and beneficially expounded in furtherance of that object. (x)

As the statutes of limitations relate to *Real Property*, they in most cases absolutely preclude all investigation and all remedy in *every* case where there has been an *adverse* possession for more than sixty years, and in some cases though not for more than thirty years; (y) and in many cases even where the possession of a house or land, or other corporeal property, has been *adverse for twenty years*, pending an ownership in fee simple and adverse to such owner. (z) But as has been cautiously observed, there are many exceptions that will prevent even sixty years' undisturbed possession from constituting a complete bar,

(x) *Murray* v. *The East India Co.* 5 Bar. & Ald. 214; *Tolson* v. *Kaye*, 6 Moore, 538; *White* v. *Panther*, Knapp's Rep. 226, &c.

(y) 32 Hen. 8, c. 2. But a possession during a long term of years, or during a tenancy for life, would not be adverse as to a remainder-man, &c. see Com. Dig. Temps.; *post*, 747, note (a); *Doe* v. *Pike*, 3 Bar. & Adolp. 738; *Doe* v. *Phillips*, Id. 753.

(z) 21 Jac. 1, c. 16, s. 1, 2.

such long continued possession, without showing that it has been consistent also with the right, is by no means a title to be confided in.(*a*) However, as the policy of these statutes is favoured, they have, as we have seen, been recently extended to *incorporeal interests*, such as rights of *common* and ways and watercourses, and other easements, to which the former acts did not extend, (*b*) and by that act twenty years' adverse possession of or exclusion from a right of *common* or *way* or *watercourse*, or *other easement*, pending an ownership in fee simple in possession, is conclusive for or against the right, though not so if pending a tenancy for life or years, and without the acquiescence of the owner in fee. So, on the other hand, the frequent interruption of a right of this nature during the last twenty years, frequently at common law, and independently of any statute, constitutes a bar to any action for the recovery of the supposed right. (*c*)

Actions for *debts or breaches of contract*, not founded on instruments of *record* or *under* seal, are barred, unless they be commenced within *six years* after the cause of action accrued, and in some cases of personal wrongs, as assaults and batteries, the action must be commenced within *four* years, and actions for words within *two* years, (*d*) and no *verbal* acknowledgment of a debt, excepting it has been so substantial an admission as a *part payment*, is sufficient to prevent the operation of the statutes. (*e*)

The object, principle, and utility of these acts in general.

Several *reasons* have concurred in introducing these enactments. Thus with regard to *real property*, after upwards of sixty years' adverse possession, or even a shorter time, upon every principle of justice and with the exception of *fraud*, a person should be quieted and rendered secure in his possession, for although he or his ancestor might, if sued within a reasonable time after he first obtained possession, been able to produce documents and adduce evidence in proof of a legal right, such evidence, by accident or lapse of time, may have become wholly lost, and it would be unjust to require him, in favour of so latent and torpid a claimant, to prove his title; besides, by death and descent or devise, or by alienation, a new succession of persons

(*a*) Sugd. V. & P. 8 ed. 348 to 357.

(*b*) 2 & 3 Wm. 4, c. 71; *ante*, 284 to 286; and see the whole act, *post*, 745, 746, in notes.

(*c*) As to the consequences of *non user* in general, see *Moore* v. *Hanson*, 3 Bar. & Cres. 332; and as to the destructive consequences of *interruptions* within twenty years, not successfully litigated, see *Benest* v. *Pisson*, Knapp's Rep. 60; *ante*, 284.

(*d*) 21 Jac. 1, c. 16, s. 3.

(*e*) 9 Geo. 4, c. 14; and why, see *White* v. *Parnther*, Knapp's Rep. 226, 227.

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may have become the occupiers, and under such circumstances it would be most unjust, at a great distance of time, to dispossess the owner or occupier, whose children have probably been educated in the faith of having shares of the property, and the loss of which might plunge them into utter ruin. (*f*) Whereas a claimant, after such a lapse of time, and after sleeping so long on his strict legal rights, would sustain no just disappointment by being deprived of the means of pursuing so stale a demand. (*f*)

So with respect to claims of a *personal* nature, as for supposed *debts* or *damages*, the lapse of six years from the time when the party injured might have sued, induces a presumption that the claim has really been satisfied, and that the receipt or other evidence has been accidentally destroyed, lost or mislaid; (*g*) or if not, that the claimant has considered the claim as too weak to prosecute or not worth proceeding for; and therefore there is no injustice in these cases in enacting that such long delays shall operate as a fixed and perpetual bar.

And in regard to *assaults* and *batteries* and *verbal slander*, as the proof of these injuries generally depends on doubtful and conflicting parol evidence, and as a party who will slumber upon the insult for years cannot be considered a favoured object of the courts, it is highly expedient that shorter time, as four and two years, should be allowed for actions to compensate them than for injuries to *property*.

Reasons for the exceptions thereto.

But to provide protection for *infants* and *married women*, and persons *imprisoned* or *beyond sea*, who may not be able to prosecute their rights within the prescribed times, (excepting as regards *real actions*,(*h*)) further time is allowed to *them* to proceed after their disability has been removed. (*i*) And in order to prevent its being *compulsory* on a creditor to sue his debtor in cases where he may be disposed to indulge, it is provided that by *adequate acknowledgments* made by the debtor, the demand may be allowed to continue outstanding beyond the prescribed period, from the time when the cause of action first accrued; but that to prevent perjury, this acknowledgment should be made either substantially by a part payment, or in writing, signed by the party himself to be affected by it; (*k*) and

(*f*) See observations in *White* v. *Panther*, Knapp's Rep. 227.

(*g*) It was on that *presumption* that the 21 Jac. 1, c. 16, was passed, *per* Lord Ellenborough, *Leaper* v. *Tatton*, 16 East, 420.

(*h*) See Sugd. Vend. & P. 8 ed. 349, and Bro. Reading, 60, where the mistake in Bacon's Abridgment is pointed out, and it is shown that the exception in 32 Hen. 8, c. 2, only extends to *then existing disabilities*.

(*i*) 32 Hen. 8, c. 2, s. 9; 21 Jac. 1, c. 16, s. 7.

(*k*) 9 Geo. 4, c. 14; see decisions, *post*, 767.

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there is a similar provision where the wrong-doer is out of the kingdom at the time the cause of action accrued. (*l*)

Reasons for limiting actions against justices, &c.

With respect to *Justices of the Peace*, and other *public officers and individuals* acting under particular powers for the benefit of the public, without any private benefit to themselves, inasmuch as they have many arduous and sometimes perilous duties to perform, and the construction of the statutes under which they have to act are frequently exceedingly nice and difficult, it has been considered necessary to protect them more particularly, and to prevent actions for trespasses arising from an error in judgment being long kept hanging over their heads, and until they may have lost the evidence in support of their defence; and therefore actions against Justices of the peace, constables, headboroughs, and other officers, or persons acting by their order and in their aid, for any act mistakenly done under colour of their office, or of the particular power, are to be brought generally within *six calendar months* after the act committed. (*m*) So actions against officers and others, acting under the laws for the protection of the *Customs* and *Excise*, must be brought within *three lunar months*; (*n*) and actions against persons for acts done under the larceny act, (*o*) and malicious injury act, (*p*) must also be brought within *six calendar months*. And an action for any thing done under the vagrant act is limited to *three calendar months*. (*q*)

The variations of these provisions, and necessity for a general uniform act.

Clauses of this nature will be found in almost every act, whether general or local, that has been enacted since the year 1760, and it is to be regretted that they are not uniform in their enactments, they being sometimes *three lunar* months, sometimes *three calendar* months, in others *six lunar*, and in others *six calendar* months; sometimes *ten days*, or twenty-one days, &c., which variations with the requisites of demand of inspection of the warrant, notice of action, local venue, and other restrictions, too frequently constitute difficulties and grounds of defeat or nonsuit (we might say *traps*,) in cases where, in real justice, a party injured under colour of authority is entitled to very considerable damages, but which, by the shortness of time allowed for suing, are lost by its turning out too late to retrace the formal steps which may have been incorrectly taken

(*l*) 4 & 5 Ann. c. 16, s. 19.

(*m*) 24 Geo. 2, c. 44, s. 8; *post*.

(*n*) *Lunar months*, 28 Geo. 3, c. 37, s. 23, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, says *calendar*; see Tidd, 9 ed. 20.

(*o*) 7 & 8 Geo. 4, c. 29, s. 75.

(*p*) 7 & 8 Geo. 4, c. 30, s. 24, 41; 5 Bing. 336.

(*q*) 5 Geo. 4, c. 83, s. 18.

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in pursuit of justice. One general uniform act relative to these injuries, and regulating the proceedings, seems essential to complete justice.

Practical considerations of each act in particular.

I. At Law.

Having given an outline of those enactments, and adverted to the principles upon which they with their exceptions and qualifications are founded, it will now be necessary to take a more *practical view* of the enactments and the decisions thereon, and upon their operation in the different courts.

1. As to *Real* property 21 Jac. 1, c. 16.

The principal statute having practical(*r*) application *to Real property Corporeal*, as houses, buildings, and land, is 21 Jac. 1, c. 16, entitled, "An Act for Limitations of Actions, and for avoiding of Suits in Law." The first section enacts, for quieting of men's estate, and avoiding of suits, That all *writs of Formedon* in descender, formedon in remainder, and formedon in reverter, shall be sued and taken *within twenty years next after the title and cause of action first descended* or fallen. And that no person shall *make any entry* into any lands, tenements, or hereditaments, but within twenty years next after *his right or title first descended or accrued to the same*, (*s*) and in default thereof such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding. (*t*)

Section 2 then provides, nevertheless, That if any person entitled to such writ, or that shall have such right or title of entry, be, at the time of the said right or title *first descended* or accrued, come or fallen within the age of *twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas*, that then such person and his heir shall, notwithstanding the said twenty years be expired, bring his action or make his entry as he might have done before this act; so as such person or his heir shall within *ten years* next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

The 4 & 5 Ann. chap. 16, s. 16, also enacts, that no *claim* or

(*r*) It would be beyond the scope of this summary to comment on the statute of limitations, 32 H. 8, c. 2, limiting *Real* actions, some to sixty and some to thirty years. They are ably considered as constituting a bar to the Right or Remedy in Sugden's Ven. & P. 8 ed. 348 to 357, and Adams' Law of Eject. 3d ed. 4.

(*s*) See the materiality of the words *first descended*, Sug. Ven. & P. 349, and Chitty's Col. Stat. 698, note (*g*).

(*t*) The subsequent statute, 4 & 5 Ann. c. 16, s. 16, provides, that if the *entry* be made within the *twenty years*, then it shall suffice to commence an action of ejectment within a year after such entry, thereby in effect giving nearly *twenty-one* years in some cases for proceeding by action of ejectment; and see Adams' Ejectment, 3 ed. 102.

entry to be made of or upon any lands, tenements, or hereditaments, shall be of any force or effect to avoid any *fine* levied or to be levied with proclamations, according to the statute, of any lands, tenements, or hereditaments, or shall be a sufficient entry or claim within the statute made on the 21 Jac. 1, c. 16, unless upon such entry or claim an *action* shall be *commenced* within one year next after the making of such entry or claim, and prosecuted with effect."

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4 & 5 Ann. c. 16, s. 16.

The 2 & 3 Wm. 4, c. 71, *for shortening the time of prescriptions in certain cases*, deserves the fullest attention, and has been before in part abstracted and commented upon. (*u*) It relates to *real property incorporeal*, such as actions relating to right of common, rights of way and watercourses, ancient windows and lights, and other profits, and easements on or connected with land, and in general establishes rights relating thereto which have been exercised adversely for twenty years, with certain exceptions and qualifications. There is also another act of the same session, of the same nature, for shortening the time required in claims of *modus decimandi*, or *exemption* from or discharge of *Tithes*. (*x*) The statute 2 & 3 Wm. 4, c. 71, is so important in its provisions, that it is stated in the subscribed note. (*y*)

2 & 3 Wm. 4, c. 71.

(*u*) *Ante*, 285, 286, and see further, *infra*, note (*y*).

(*x*) 2 & 3 Wm. 4, c. 100, and see *Lord Kensington* v. *Pugh*, 1 Young's Rep. 125.

(*y*) The Act 2 & 3 Wm. 4, c. 76, is intituled "An Act for shortening the Time of Prescription in certain cases." It recites,

Whereas the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that *no claim* which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of *our sovereign lord the king, his heirs or successors*, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or *of any ecclesiastical or lay person*, or body corporate, except such matters and things as are herein specially provided for, and except *tithes, rent, and services*, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose *by deed or writing*.

Claims to right of common and other profits *à prendre*, not to be defeated after thirty years' enjoyment by showing the commencement; after sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

II. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any eccle-

In claims of right of way or other easement, the periods to be twenty years and forty years.

Decisions on the operation of the statutes of limitations as to *Real* property *Corporeal* at *law*.

siastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter, as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Use of light for twenty years indefeasible, unless with consent.

III. And be it further enacted, That when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by *deed or writing*.

What not an interruption

IV. And be it further enacted, That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

In actions on the case the claimant may allege right generally. In pleas to trespass, period of enjoyment mentioned in this Act to be alleged and exceptions to be replied specially.

V. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemoral, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

Restricting the presumption to be allowed in support of claims herein provided for.

VI. And be it further enacted, That in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act, as may be applicable to the case and to the nature of the claim.

Proviso for infants, &c.

VII. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What time to be excluded in computing the term of forty years appointed by this Act.

VIII. Provided always, and be it further enacted, That when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

IX. And be it further enacted, That this Act shall not extend to Scotland or Ireland.

c. 16,(z) and the 9 Geo. 3, c. 16, limiting claims on behalf of the king; and as to *real property Incorporeal* (such as right of common, or way, or watercourse, and certain other easements,) the 2 & 3 Wm. 4, c. 71. (z) The following observations will be found principally extracted from the works referred to in the note, with some additional recent decisions, and principally as regards actions of *ejectment*. (z) *Real* actions commenced for the recovery of property after the right of entry has been barred by twenty years' adverse possession, are but of rare occurrence, and though fully considered in the next volume, in discussing the jurisdiction and practice of the Court of Common Pleas, will here be only occasionally noticed.

CHAP. IX. STATUTES OF LIMITATIONS. 9 Geo. 3, c. 16.

By the enacting and the saving clauses of 21 Jac. 1, c. 16, s. 1 and 2, all writs of *Formedon* are to be issued, and all *Entries* made, or action of ejectment commenced, within *twenty years* next after the right or title *first descended or accrued*, (a) and then it is *provided*, that if at *that time* the party *then* entitled be within the age of 21, feme covert, non compos mentis, imprisoned, or beyond the seas, then such party or his heir may

The twenty years for commencing *Formedon* or *Ejectment* begin to operate from the time the right *first descended*.

X. And be it further enacted, That this Act shall commence and take effect on the first day of Michaelmas term now next ensuing.

XI. And be it further enacted, That this Act may be amended, altered, or repealed during this present session of parliament.

(z) For the decisions upon these statutes as relates to real property *Corporeal*, see Sugd. V. & P. 8th ed. 348 to 359; and Adams on Ejectment, 3d ed. 46 to 59; Chitty's Col. Stat. tit. Limitations, a careful perusal of which will be found essential. Reference should also be had to *White* v. *Paruther*, Knapp's Rep. 226 to 230; and *Beast* v. *Pisson*, Id. 60, for the *principles* upon which the statutes of limitations and prescriptions proceed. It will be observed that in the former work, p. 349, the dictum in Bacon's Abridgment, that there is any saving in the 32 Hen. 8, in favour of infants, feme coverts, persons in prison and beyond the seas, is corrected, and that the saving in that act is confined to disabilities existing at the time *that statute was made*.

(a) As the twenty years for making an entry do not commence until the *right* to make the same has *accrued*, it has been observed and held that even upwards of sixty years' apparent adverse possession will not necessarily constitute a perfect title, and that it is possible that an estate may be enjoyed for even hundreds of years, and yet the same may at last be *recovered* by a *remainder-man*; for instance, suppose an estate to be limited to one *in tail*, with *remainder over* to another in fee, then although the *tenant in tail* may have become barred of his remedy by the statute of limitations, yet as it is evident that whilst *his* estate subsisted the *remainder-man's* right of entry could not take place until the failure of issue of the tenant in tail, and which may not happen for an immense number of years, and afterwhich, and at any time within twenty years after the death of the last issue in tail, the *remainder-man* might maintain ejectment. Sugd. V. & P. 353; and *Taylor* v. *Horde*, 1 Burr. 60; 5 Bro. C. C. 247; Cowp. 689, S. C. So in a late case, where an heir *in tail* brought ejectment against a defendant who had been in receipt of the rents *thirty years*, during the life of the ancestor in tail, and seven years after his death; but it appeared that the ancestor *once* had seisin, and there was evidence to explain under what circumstance the defendant had had such long-continued receipt of the rents; it was held that such possession by the defendant was no bar to the action of ejectment, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession by showing that the ancestor had *not* conveyed by fine and recovery, or otherwise than by an innocent conveyance. *Doe* d. *Smith* v. *Pike and another*, 3 Bar. & Adolp. 738; *Doe* v. *Phillips*, Id. 753.

CHAP. IX. Statutes of Limitations.

bring his action or make his entry, provided he do so within *ten years* after the ceasing of such disability.

With respect to the statute 21 Jac. 1, c. 16, (*b*) which only applies to *Real property Corporeal*, it will be observed that, according to the ancient doctrine of *nullum tempus occurrit regi*, the *King* is not bound by the same, nor are *Ecclesiastical persons*(*c*) within it, because it would be an indirect means of evading the statutes made to prohibit their alienations; but that with respect to *all other persons* the statute applies if they were capable of a right to enter; and therefore if it appear that there has been *a possession by the defendant, or those under whom he holds, for the last twenty years' adverse to the title of the claimant,* and that the claimant has not been prevented from prosecuting his claim earlier by reason of some of the *disabilities* allowed by the statute, he will be barred of his remedy by ejectment.

Twenty years' *adverse* possession when a bar, and what possession is to be deemed adverse or not so.

It is therefore necessary particularly to consider when or not the possession is to be considered as *Adverse*. And here there are four general rules when it is not so, viz. *first*, when both the parties claim under the *same* title; *secondly*, when the possession of the one party is *consistent* with the title of the other; *thirdly*, when the claimant has never, in contemplation of law, been out of possession; and *fourthly*, when the occupier has acknowledged the claimant's title.

What are not adverse possessions.

First, As an instance of the first description, where the parties claim under the same title, this case has been put. If a man seised of certain land in fee have issue two sons and die seised, and the younger son enter by abatement into the land, the statute will not operate against the elder son; for when the younger son so abated into the land after the death of his father, before an entry made by the elder son, the law intends that he entered claiming as heir to his father, by which title the elder son also claims. (*d*). So also if the defendant should make title under the sister of the lessor of the plaintiff, and prove that she had enjoyed the estate above twenty years, and that he had entered as heir to her, the court would not regard it, because her possession would be construed to be by courtesy, and not to make

(*b*) See this statute, *ante*, 744.

(*c*) By the stat. 9 Geo. 3, c. 16, the king is disabled from claiming title (except to liberties and franchises), unless the same shall accrue within the space of sixty years next before suit or claim; and consequently an adverse possession of lands for sixty *years* will now be a good title even against the crown. The 2 & 3 Wm. 4, c. 71, further affects the King, as well as Ecclesiastical persons, with respect to *Incorporeal* rights, such as commons and other profits or benefits, except tithes, rents, and services.

(*d*) Co. Litt. s. 396.

a disherison, but by silence to preserve the possession of the brother, and therefore not within the intent of the statute; though if the brother were once in actual possession, and ousted by his sister, it would it seems be otherwise, for then her entry could not possibly be construed to be to preserve his possession. (e)

Secondly, As an instance where the possession of one party is consistent with the title of the other, the following case has been put. Where by a marriage settlement a copyhold estate of the wife was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement, it was held that if he had had no other title than the admission, a possession by him for twenty years would have barred the heir of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life in the nature of a tenant by the courtesy, *and this without any admittance after the death of the wife*, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband within twenty years after the husband's death, though more than twenty years after the death of the wife. (*f*) So although one third part of the premises had been settled many years before the marriage upon a third person for life, and the steward of the manor appointed by the heir and her husband had constantly debited himself with the receipt of two-thirds of the rent for the husband on account of his wife, and the remaining one-third for the annuitant, yet as no surrender had been made to the trustees of the annuitant, it was held that such payment to him must be taken to be with the consent of the person entitled by law to the whole premises, so as to do away the notion of adverse possession by the husband of that third, distinct from his possession of the other two-thirds as tenant by the courtesy after the wife's death. Again, where a party devised a certain estate to his nephew and two nieces as tenants in common, and one of them died in the testator's life time, leaving an infant daughter; and after the testator's death the nephew and surviving niece covenanted to convey one-third to

(e) Bull. N. Pr. 102; Co. Litt. 242; Sharrington v. Strotton, Plowd. 298, 306.

(*f*) *Doe* d. *Milner* v. *Brightwen*, 10 East, 583.

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a trustee, upon trust to convey the same to the infant if she attained twenty-one, or otherwise to themselves; but no conveyance was executed pursuant to the deed, but a third of the rents were received by the trustee for the use of the infant during her life; it was held that there was no adverse possession until the death of the infant, and that the devisee of the nephew might maintain ejectment for his share of the undivided third within twenty years after the infant's death, although more than twenty years after the death of the nephew. (*g*) So also where the rents of a trust estate were received by a *cestui que trust* for more than twenty years after the creation of the trust, without any interference of the trustees, such possession being consistent with and secured to the *cestui que trust* by the terms of the trust deed, the receipt was held not to be adverse to the title of the trustees, so as to bar their ejectment against the grantees of the *cestui que trust* brought after twenty years. (*h*) And indeed it has been observed, that as the *cestui que trust* is always to be considered as a tenant at will to the trustees, (*i*) and his possession is to be considered as that of the trustees, the statute will never operate between trustee and *cestui que trust* except in very particular cases. (*k*) But that rule holds only between *cestui que trust* and trustee, and not between *cestui que trust* and trustee on one side and strangers on the other. (*k*) Thus where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against both. (*k*) And even if a *cestui que trust* sell or devise the estate, and the vendee or devisee obtain possession of the title deeds and enter, and do no act recognizing the trustee's title, the statute will operate from the time of such entry; (*l*) but it has been observed that this is a case of rare occurrence, and not a title to be relied upon by any purchaser. (*m*)

In like manner the non-payment of any part of principal or of interest within twenty years after, if the deed was executed, and after the principal became due, will nevertheless not be considered as affording proof of twenty years adverse posses-

(*g*) *Doe* d. *Colclough* v. *Hulse*, 3 B. & Cres. 757. But on the other hand, where copyhold lands had been granted to *A.* for the lives of herself and *B.*, and in reversion to *C.* for other lives; and *A.* died, having devised to *B.*, who entered and kept possession for more than twenty years; it was held that *C.* was barred by the statute after *B.*'s death from maintaining ejectment, for that *C.*'s right of possession accrued on the death of *A.*, inasmuch as there could not be a general occupant of copyhold land. *Doe* d. *Foster* v. *Scott*, 4 Bar. & Cres. 706.

(*h*) *Keane* d. *Lord Byron* v. *Deardon*, 8 East, 248; and see Sugd. V. & P. 8th ed. 354, fully.

(*i*) *Gree* v. *Rolle*, Ld. Raym. 716.

(*k*) Sugd. V. & P. 8th ed. 354.

(*l*) Id. ibid. 354, 355, where see the cases of adverse possession in cases of trust fully collected and observed upon.

(*m*) Id. ibid.

sion so as to bar the remedy by ejectment, because such possession is consistent with the original agreement of the parties. (*n*)

Mr. Serjeant Adams, in his valuable work on Ejectments, (*o*) observes, as to *inclosures from the waste,* that it is as yet a very unsettled point whether an encroachment upon the waste adjoining to the demised premises made by a lessee, and uninterrupted possession thereof by him for twenty years, shall give to such lessee a possessory right thereto, or whether he shall be deemed to have inclosed the waste in right of the demised premises, for the benefit of the lessor after the expiration of the term. Lord Kenyon, C. J., Lee, C. J., and Thompson, B., held that the encroachment belonged to the lessee; whilst on the other hand Heath, J., Butler, J., Perryn, B., and Graham, B., held that the landlord is entitled to it. (*p*) But that at all events it seems clear that such possession will be adverse to the rights of the commoners, and indeed to the lord himself, excepting as landlord, at the expiration of the lease. (*q*) It is submitted, that in general when the presumption is that the land inclosed belonged to the landlord, it would at the expiration of the tenancy belong to him, notwithstanding more than twenty years since the first inclosure have expired. (*r*)

It seems clear, that if an inclosure has been originally made by permission, or if there has been an admission of permission or tenancy within twenty years, then the statute of limitation will not bar;(*s*) and on that principle, where a party inclosed a small piece of waste land and occupied it for thirty years, without paying rent, but at the expiration of that time the owner of the adjoining land demanded sixpence rent, and the party who had inclosed paid the same on three several occasions, it was held that this evidence, in the absence of all other circumstances, was conclusive to show that the occupation of the defendant began by permission. (*t*) So where a cottage, standing in the corner of a meadow, (belonging to the lord of a manor) but separated from the meadow and from a highway by a hedge, had been occupied for about twenty years without any payment of rent, and then, upon possession being demanded by the lord, was reluctantly given up; and having been so given up, was re-

(*n*) *Hatcher* v. *Fineux*, Lord Raym. 740; *Hall* & *Doe* d. *Surtees*, 5 B. & A. 687; cited *Doe* v. *Pike*, 3 Bar. & Adolp. 741; Sugd. V. & P. 8th ed. 355 to 357.

(*o*) Adams on Ejectment, 3d ed. 51, 52; and *ante*, 237, note.

(*p*) *Doe* d. *Colclough* v. *Mulliner*, 1 Esp. 460; *Creach* v. *Wilmot*, 2 Taunt. 160, in notes; *Doe* d. *Challenor* v. *Davies*, 1 Esp. 461; *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208.

(*q*) *Creach* v. *Wilmot*, 2 Taunt, 160, in notes; and see 2 & 3 Wm. 4, c. 71; *ante*, 285.

(*r*) And see *ante*, 237, note (*n*).

(*s*) Adams's Eject. 3 ed. 51, 52, 237; Bull. Ni. Pri. 104.

(*t*) *Doe* d. *Jackson* v. *Wilkinson*, 3 B. & Cres. 413.

stored to the party, he being at the same time told, that if allowed to resume possession, it would only be *during pleasure*, and he kept possession for fifteen years more, and never paid any rent; it was held that the jury were warranted in presuming that the possession had commenced by the permission of the lord. (*u*)

Thirdly, We have seen that an adverse possession will be negatived when the party claiming title has never, in contemplation of law, been out of possession. As when *A.* devised lands to *B.* and his heirs, and died, and *B.* died, and afterwards the heir of *B. and* a stranger entered, and took the profits for twenty years; upon ejectment brought by the devisee of the heir of *B.* against the stranger, it was held that this perception of the rents and profits by the stranger was not adverse to the devisee's title; because, when *two* men are in possession, the law adjudges it to be the possession of him who hath the right; the lessor of the plaintiff and the defendant were not tenants in common, for the defendant was a mere stranger, and though he took a moiety of the profits, that would not make him a tenant in common; for a man cannot disseise another of an undivided moiety as he might of a part of the land. (*x*) So upon the principle that the possession of one joint-tenant, parcener, or tenant in common, is *primâ facie* the possession of his companion, (*y*) it follows that the possession of the one can never be considered as adverse to the title of the other, unless it be attended by circumstances demonstrative of an adverse intent; or in other words, whenever one joint-tenant, tenant in common, or parcener, is in possession, his fellow is, in *contemplation of law*, in possession also, and it is necessary to prove an *actual* ouster to rebut this presumption. Some ambiguity seems formerly to have prevailed as to the meaning of the words *actual ouster*, as though it signified some act accompanied by real force; (*z*) but it is now clear that an actual ouster may be inferred from circumstances, and which circumstances are matter of evidence to be left to the jury. Thus thirty-six years' sole and uninterrupted possession by one tenant in common, accompanied with other strong circumstances, and without any account to, or demand made, or claim set up by his com-

(*u*) *Doe* d. *Thompson* v. *Clarke*, 8 B. & C. 717.

(*x*) *Reading* v. *Rawsterne*, Ld. Raym. 329.

(*y*) *Ford* v. *Gray*, Salk. 285; *Smales* v. *Dale*, Hob. 120; *Doe* d. *Barnet* v. *Keen*, 7 T. R. 386.

(*z*) *Fairclaim* d. *Fowler* v. *Shackleton*, Burr. 2604; as to what is an actual ouster, *ante*, 374, 375; Co. Lit. 199, b., 200, a.

panion in the mean time, were held to be sufficient grounds for a jury to presume an actual ouster of the co-tenant. (*a*) So, if upon demand by the co-tenant of his moiety of the rent, the other should refuse to pay, and deny his title, saying he claims the whole, and will not pay, and continue in possession, such possession from that time would be deemed adverse. And where there were two joint-tenants of a lease for years, and one required the other to quit the house, and he did so, this was held to be an actual ouster; (*b*) and although the entry of one is, generally speaking, the entry of both, yet if one enter, claiming the whole for himself, it will be an entry adverse to his companion. (*c*) But a mere perception of the whole rents or profits by one tenant in common for twenty-six years, would not alone be deemed adverse. (*d*) And where a tenant in common levied a fine on the whole premises, and afterwards took all the rents and profits for only five years, but it did not appear that he held adversely at the time of levying the fine, it was held that such fine and receipt were not sufficient evidence of an ouster of his companion. (*e*) But the possession of one heir in gavelkind is not the possesion of the other, if he enter with adverse intent to oust the other. (*f*) If an estate descend to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the other after the twenty years have elapsed. (*g*)

It should seem that the circumstance of there having been *long unexpired leases* of property will not, of itself, prevent the statute from running, excepting perhaps where a mere pepper corn rent has been reserved; for in cases where any considerable rent has been reserved and, pending such a lease, for upwards of twenty years no payment of rent, nor other acknowledgment of a tenancy, has taken place, the possession would be deemed adverse, and the statute would run; for otherwise, even sixty years, without any acknowledgment of a tenancy, might defeat the operation of the act. (*h*)

(*a*) *Doe* d. *Fisher* v. *Prosser*, Cowp. 217; *ante*, 374, 375. But see observations on that case in *Doe* v. *Pike*, 3 Bar. & Adolp. 741; the circumstances of adverse possession were in that case particularly strong.

(*b*) *Doe* d. *Fisher* v. *Prosser*, Cowp. 217; *Doe* d. *Hellings* v. *Bird*, 11 East, 49.

(*c*) Vin. Ab. 14, 512.

(*d*) *Fairclaim* d. *Fowler* v. *Shackleton*, 5 Burr. 2604, but there there was an admission. See, however, further, *Doe* v. *Pike*, 3 Bar. & Adolp. 738; *Doe* v. *Phillips*, Id. 753; and see *ante*, 749, n. (*e*); the possession by a *mortgagor* without payment or acknowledgment within twenty years is considered the possession of the mortgagee, *ante*, 752, n. (*n*); but see *supra*, n. (*a*).

(*e*) *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568, 574; *sed vide Story* v. *Windsor*, 2 Atk. 630, 632.

(*f*) *Davenport* v. *Tyrrell*, 1 W. Bla. 675.

(*g*) *Roe* d. *Langdon* v. *Rowlston*, 2 Taunt. 441.

(*h*) See observations in *Cholmondeley* v. *Clinton*, 1 Turner & Russ. 118, 119.

Fourthly, When *the possessor has acknowledged a title in the claimant, then the possession will not be deemed adverse.* As where a lease for a long term had been granted by the lord of the manor to the rector, in which the lessee covenanted for himself, his executors and assigns to pay, during the continuance of the term, a certain annual rent, and also all the tithe straw of wheat and rye within the parish; and the lessee and his assigns (the succeeding rectors) continued in possession for twenty years and upwards after the expiration of the term, without payment of rent, but during that twenty years suffered the heir of the lessor to take the tithe of the wheat and rye straw, it was held that such sufferance was evidence of an agreement between the lessor and lessee, or their heirs and assigns respectively, that the lessee or his assigns should continue in possession if the lessor and his heirs were permitted to receive the tithe as before, and that consequently there was no adverse holding in the assignee of the lessee. (*i*) We have also seen other acknowledgments that are sufficient to prevent the possession from being deemed adverse. (*k*)

When a holding over after forfeiture does not constitute an adverse possession.

With respect to *Forfeitures*, though they *immediately* create a right of entry, yet it is not compulsory on the owner or remainder-man immediately to exercise that right, and he may waive or suspend his claims until a subsequent time, and even until the lease for years, or estate for life, has determined by effluxion of time or other natural event, so that the twenty years do not *necessarily* run from the time of the forfeiture. (*l*) Thus, where a copyholder, with license, leased the copyhold for forty years, with a clause of re-entry upon non-payment of rent, and then devised such copyhold to *A.* and died, twenty years of the lease being then unexpired, and the heir received the rent from the lessee from the time of the death of the copyholder until the expiration the lease, and for ten years afterwards, when the devisee brought an action of ejectment: it was decided that the devisee was not barred by the statute, although more than twenty years had elapsed from the time of the death of the testator, and the forfeiture of the lease by non-payment of rent to the devisee; for until the termination of the lease, the devisee had no right to enter, except for the forfeiture, and although he might have entered by reason of the forfeiture, yet he was not bound to do so. (*m*)

(*i*) *Roe* d. *Pellat* v. *Ferrars*, 1 Bos. & Pul. 542.

(*k*) *Ante*, 751, n. (*t*); 752, n. (*u*).

(*l*) *Doe* v. *Danvers*, 7 East, 299; *Hovenden* v. *Lord Annesley*, 2 Scho. & Lef. 624; so in equity, see *Fausset* v. *Carpenter*, 2 Dow. Rep. N. Series, 232; but see observations respecting what has been said in the House of Lords in *Cholmondeley* v. *Clinton*, 1 Turn. & Rus. 118, 119; *ante*, 753, n. (*h*.)

(*m*) *Doe* d. *Cooke* v. *Danvers*, 7 East, 299.

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So it has been held, that where there is a proviso in a lease that it shall be void in case of a breach, the landlord alone can treat it as void, and which he may do at any time on a subsequent breach. (m)

Disabilities excepted in 21 Jac. 1, c. 16, s. 2, as to *Real* property, and cases thereon.

The saving clause in the statute 21 Jac. 1, c. 16, s. 2, only extends to the person on whom the right first descends, and therefore, when the time once begins to run, nothing can stop it. So that on the death of a person in whose life the time first *began to run*, his heir must enter within the residue of the ten years, although he laboured under a disability at the death of his ancestor. (n) In other words, to enable a party to take advantage of the extension of time granted by the second section of this statute, it is necessary that the disability to enter should exist at the time when the title under which he claims, whether to him or his ancestor, *first* accrued, for if he or his ancestor had the power to enter but for an instant no subsequent disability will be sufficient to arrest the operation of the statute, and the principle is the same where a disability existing at the time of the commencement of the title is afterwards removed, and a subsequent disability ensues, the statute continuing to run notwithstanding the second disability. It was once indeed endeavoured to distinguish between cases of voluntary and involuntary disability in this respect, and to maintain that an involuntary disability, as insanity, occurring after the statute had begun to run, would suspend its progress; but the argument was overruled, upon the principle that a different construction had always been given to all the statutes of limitations, and that such nice distinctions would be productive of mischief. (o)

It was said by Lord Chancellor Hardwicke, that if a man both of non-sane memory and out of the kingdom, come into the kingdom, and then go out of the kingdom, his non-sane memory continuing, his privilege as to being out of the kingdom is gone, and his privilege as to non-sane memory will cease from the time he returns to his senses. (p) So when the ancestor, to whom the right first accrues, dies under a disability which suspends the operation of the statute, his heir must make his entry within ten years next after his ancestor's death,

(m) *Rede* v. *Farr*, 6 M. & S. 121; *Doe* d. *Bryan* v. *Bancks*, 4 Bar. & Ald. 401, S. P.

(n) Sugd. V. & P. 8th ed. 349, 350, cites *Doe* v. *Jones*, 4 T. R. 300; *Cotterell* v. *Dutton*, 4 Taunt. 826, *infra*.

(o) *Doe* d. *Duroure* v. *Jones*, 4 T. R. 300; et *vide Stowell* v. *Lord Zouch*, Plow. 366; *Cotterell* v. *Dutton*, 4 Taunt. 826, see observations on last case, Sugd. V. & P. 8th ed. 352.

(p) *Sturt* v. *Mellish*, 2 Atk. 610, 614.

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provided more than twenty years have elapsed from the time of the commencement of the ancestor's title to the time of the expiration of the ten years.(q) It was once indeed contended that the meaning of this second section of the statute was to allow every person at least twenty years after his own title accrued, if there were a continuing disability, from the death of the ancestor last seised, and ten years more to the heir of the person dying under a disability, which ten years were, in addition to the twenty years, allowed by the first clause; but it was justly observed by the court that if that construction could prevail there was no calculating how far the statute might be carried, by parents and children dying under age, or continuing under other disabilities in succession, and that the word *death*, in the second clause, meant and referred to the death of the person to whom the right *first* accrued, and was probably introduced in order to obviate the difficulty which had arisen in the case of Stowell *v.* Lord Zouch,(r) upon the construction of the statute of fines, from the omission of that word, and that the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor to whom the right first accrued during the period of disability, and who died under such disability, notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired.(s)

Rent charges, quit rents, &c.

The statute 21 Jac. 1, c. 16, does not however extend to rent charges created by deed, and as to which there is no prescribed limitation of time at law or in equity,(t) or to quit rents,(u) or to rents arising by grant under seal, or will.(x) So that any number of years' arrears of them may be recovered, unless there be evidence to presume payment, which presumption might be allowed, as in case of a bond.(y)

Common law, presumption in favour of some *Incorporeal rights* after twenty years' enjoyment.

There is a species of *common law limitation* of some rights and the power of disputing the same which, independently of

(q) *Doe* d. *George* v. *Jesson*, 6 East, 80; see observation thereon, Sugd. V. & P. 351, 352.

(r) Plow. 366; Sugd. V. & P. 8th ed. 350, 351.

(s) *Doe* d. *George* v. *Jesson*, 6 East, 80.

(t) *Cussit* v. *Jackson*, M'Clel. Rep. 495, and 13 Price, 721, S. C.; and see *Collins* v. *Goodhall*, 2 Vern. 235, and *Stackhouse* v. *Barnston*, 10 Ves. J. 467; but there may be a *presumption* of payment as in case of a bond, Id. ibid.

(u) *Eldridge* v. *Knott*, 1 Cowp. 214. According to that case, mere length of time, short of the period fixed by the statute of limitations, and unaccompanied with any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a *quit rent*; see also, *ante*, 228.

(x) *Collins* v. *Goodhall*, 2 Vern. 235.

(y) *Stackhouse* v. *Barnston*, 6 Ves. J. 467.

the act 2 & 3 Wm. 4, c. 71, has ever affected and still affects rights of common, ways, watercourses and other incorporeal rights, profits and easements, viz., *twenty years' undisturbed enjoyment*, which has long been considered as affording at least *primâ facie* evidence of what is termed a *Prescriptive right;* or where the easement cannot in law be claimed by prescription, but only by custom, then of a *Customary right.*(z) Thus a *presumptive* right and title to common (except common appendant) upon the land of another, may be acquired merely by twenty years' user or enjoyment without any actual conveyance or deed or other grant or title; (a) and the same presumption of a perfect grant of a right of *way,*(b) or of the use of ancient lights,(c) was always to be inferred from twenty years' exercise of such a right. And the same rule prevails as to *Customs,* whether affirmative or negative, with respect to which a usage for twenty years has long been considered as at least presumptive *primâ facie* evidence of a corresponding right. (d)

But there must not have been any interruption submitted to.

Upon the other hand, possession, necessary to constitute a title by such *prescription,* must have been *uninterrupted* and *peaceable,* both according to the civil law, the law of England, and that of France, Normandy and Jersey. (e) It must "have been *possessio longa, continua et pacifica, nec sit legitima interruptio, long continued* and *peaceable.*(f) *Pour pouvoir prescrire il faut une possession continue et non interrompue, paisible, publique et a titre de proprietaire.*(g) And though the right is not to be considered interrupted by mere trespassers, if the trespassers were unknown, yet if they were known, and if the trespasses have *frequently* happened, and no legal proceedings have been instituted in consequence of them, they then become the *legitimæ interruptiones,* which Bracton speaks of, and are converted into adverse assertions of right,(h) and if not promptly and *effectually litigated* they defeat the claim of rightful prescription; and a mere *threat* of action for the trespasses, without following it up, will have no effect to preserve the right."(i) And

(z) *Ante,* 282 to 286.

(a) *Moore* v. *Rawson,* 3 Bar. & Cres. 339; and see *ante,* 282 to 286.

(b) *Knight* v. *Halsey,* 2 Bos. & Pul. 206; *Campbell* v. *Wilson,* 3 East, 294; *Lidell* v. *Wilson,* 3 Bing. 115; *Moore* v. *Rawson,* 3 Bar. & Cres. 339.

(c) *Lewis* v. *Price,* 2 Saunders, 175, 176, n. 2; *Cross* v. *Lewis,* 2 Bar. & Cres. 686.

(d) *Re Jolliffe,* 2 Bar. & Cres. 54; 3 Dowl. & R. 240, S. C.

(e) *Benest* v. *Pisson,* Knapp, R. 60; *ante,* 284, a case in privy council, appeal from Jersey, which should be carefully read by every student.

(f) Domat. lib. 1, tit. 12 sect. 1, in notes; Bracton, fols. 52 & 222, 226; Co. Lit. 113, b.

(g) Code Civil, liv. 3, tit. 20, article, 22, 29.

(h) *Benest* v. *Pisson,* Knapp, Rep. 70.

(i) Id. ibid. 71.

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as a lord of the manor cannot establish a claim to the exclusive right of cutting sea weed on rocks, situate *below low water mark*, except by a grant from the king, or by such long and undisturbed enjoyment of it as to give him a title by prescription, it was held that as it appeared that others had also taken such sea weed without having been sued for so doing, the lord in that case had not established his claim.(*k*) So if a bar has been for many years maintained across a way and occasionally shut, though it may have been knocked down once, the former exclude presumption of right, and show that the way or other easement has been merely by permission.(*l*)

At common law, and independently of the above act, as observed by Lord Kenyon, from upwards of twenty years' *exclusive* and *uninterrupted* enjoyment of an easement or profit *à prendre*, a grant or even one hundred grants will be presumed, and this even against the king, if by possibility they could legally have been made;(*m*) and though before the above act it was essential to the validity of a prescription or custom that it should have existed before the commencement of the reign of Rich. I, A. D. 1189, yet in practice, proof of a regular usage for twenty years, not explained or contradicted, was that upon which many private and public rights were held, and sufficient for a jury in finding the existence of an immemorial custom or prescription, or of a lost grant.(*n*) But still twenty years or longer uninterrupted user was not conclusive, for it might be shown to have commenced during a long term of years, as pending a lease for ninety-nine years, at the expiration of which the owner in fee might insist on the determination of the easement;(*o*) or it might be shown that the use of a way or other easement commenced during an estate for life, and consequently that it did not bind the remainder-man or reversioner.(*p*) These exceptions it will be observed are provided for and continued by the foregoing act.(*q*)

Incorporeal Rights, as Commons, Ways, Watercourses, &c. as regulated by 2 & 3 Wm.

With respect to the operation of the before-mentioned statute, 2 & 3 Wm. 4, c. 71, upon incorporeal rights and

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(*k*) *Benest* v. *Pisson*, Knapp, Rep. 60; *Lowe* v. *Govett*, 3 Bar. & Adolp. 863.

(*l*) 2 Saund. 175, note (*e*); *Rex* v. *Lloyd*, 1 Campb. 260; *Rex* v. *Barr*, 4 Campb. 16; *Woodyer* v. *Hadden*, 5 Taunt. 125; *Trustees of Rugby Charity* v. *Meryweather*, 11 East, 376.

(*m*) *Roe* d. *Johnson* v. *Ireland*, 11 East, 284; *Goodtitle* v. *Baldwin*, Id. 495; and see 2 Bla. Com. edit. Chitty, 31, note, 20; 35, note 35; 265, n. 4.

(*n*) *Rex* v. *Joliffe*, 3 D. & R. 240; 2 Bar. & Cres. 54, S. C.; *Parsons* v. *Bellamy*, 4 Price, R. 198; 2 Saund. 175, a., n. (*d*); 1 Saund. 323, n. (*a*).

(*o*) *Wood* v. *Veal*, 5 Bar. & Ald. 454.

(*p*) *Daniel* v. *North*, 11 East, 372; 2 Saund. 175, a.

(*q*) *Ante*, 745, where see the act stated at length.

easements, it will be observed, that it has introduced most important and useful regulations, as well respecting *incorporeal rights themselves* as with regard to the mode of pleading. Formerly, although twenty years' non-user of a right of common might prevent a party from sustaining an action on the case for any subsequent infraction of his right, yet still he might proceed by the ancient writ of *assize*, (r) and the greatest prolixity and difficulty sometimes arose in the pleadings; whereas by the new regulations, in most cases, twenty years exercise of either of the enumerated rights or other easement, profit or benefit, excepting tithes, rent and services, (pending an ownership in fee in possession, but not during a mere tenancy for life,) *conclusively* establishes the right, and twenty years' *non-user* precludes a party from establishing his claim. (s) And instead of setting out the original grant or showing a prescriptive right from the owner in fee, it now suffices in pleading "to allege the *enjoyment* of the *common*, or *way*, or *watercourse*, &c. *as of right* by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in the act as may be applicable to the case," and without claiming in the name or right of the owner of the fee, as was usually done before the act. The exceptions enumerated in the last-mentioned act keep in view and provide for the possibility of the twenty years, or other time of enjoyment, having been during a tenancy for life or a long term of years, an acquiescence in which by temporary owner did not before the act, nor ought now to prejudice the party claiming in remainder or reversion. (t)

Limitations in Courts of Equity relative to *real* property.

When the legislature has limited a period for *proceeding at law*, (and in which alone, it will be observed, the Statutes of Limitations *profess* to operate, (u)) a Court of Equity will, as respects *Real Property*, in *analagous* cases, consider itself bound to act and decide according to the same limitation as courts of law are imperatively bound. (u) And equitable rights in general will, by the like analogy, be affected by time in the same manner as legal estates. And as respects *Trusts*, the distinction in equity is, that if the trust be constituted by the act of the *parties*, the possession of the *trustee* is the posses-

(r) *Hawke* v. *Bacon*, 2 Taunt. Rep. 159.

(s) As to the effect of non user or of *interruption* of a right within twenty years not effectually litigated, particular reference should be had to *Benest* v. *Pisson*, Knapp, 60; *Moore* v. *Rawson*, 3 Bar. & Cres. 332; and *ante*, 284 to 286.

(t) See *Daniel* v. *North*, 11 East, 372; see *Wood* v. *Veal*, 5 Bar. & Ald. 454, where at the end of a lease for ninety-nine years, the reversioner effectually stopped a right of way exercised during that term.

(u) Sugd. Vend. & Pur. 8th edit. 354 to 356; and per Lord Camden, *Clay* v. *Clay*, 3 Bro. C. C. 639; and *post*, 779, 780, 786.

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sion of the *cestui que trust*, and no length of such possession will bar; (*x*) but if a party is to be constituted a trustee by the *decree of a Court of Equity*, founded *on fraud* or the like, his possession is then considered adverse, and the Statute of Limitations will run from the time that the circumstances of *the fraud were discovered.* (*y*) And every *new* right of action in equity must be acted upon within twenty years after it accrues. (*z*) Where a party in possession of an equitable life estate under a conveyance from the equitable tenant for life without impeachment of waste, holds over after the death of the tenant for life against the trustee, and who holds the legal estate as well for the tenant for life as for the remainder-man; such adverse possession as against the trustee does not commence till the death of the tenant for life, and till then the Statute of Limitations does not begin to run. (*a*) But in general where there has been adverse possession not accounted for by some disability, as coverture or infancy, for twenty years, a Court of Equity ought not to interfere, (*b*) nor could a bill for a discovery be sustained. (*b*) And Courts of Equity so regard the express enactments relative to the disabilities, although they only imperatively operate at law, that, with analogy to them, persons labouring under any such disabilities have in equity been allowed the like protection with respect to the enlargement of time for asserting their equitable claims as they would be entitled to in the case of a legal claim. (*c*) Hence the necessity for the knowledge of all the cases whether decided at law or in equity.

The Statutes of Limitations relating to *Personal Actions* and their exceptions. (*d*)

With respect to *Personal actions* at the suit of a party injured, (and which include most actions not for the *specific* recovery of Real Property itself,) the principal *general* enactments are 21 Jac. 1, c. 16, sections 3, 4, 5, 6 & 7, and 4 & 5 Ann. c. 16, s. 19, and 9 Geo. 4, c. 14, sect. 1, 2, 3, 4, 8, 9, 10. The 21 Jac. 1, c. 16, s. 3, enacts, (*e*) that all actions of trespass *quare clasum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account and upon the case, (other than for such ac-

(*x*) *Ante*, 759, n. (*u*), cites *Willes* v. *Shorral*, 1 Atk. 476; *Stackhouse* v. *Barnston*, 10 Ves. 466; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630; *Lord Egremont* v. *Hamilton*, 1 Ball and Beatty, 516.

(*y*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 633; *Cholmondeley* v. *Clinton*, 1 Turn. & Russ. 118, 119.

(*z*) Id. 636.

(*a*) *Fausset* v. *Carpenter*, 2 Dow. & Clark, 232.

(*b*) *Cholmondeley* v. *Clinton*, 1 Turn. & R. 108.

(*c*) Sugd. V. & P. 357, and cases, id. note (*h*).

(*d*) The decisions upon the statutes of limitations respecting *Personal* actions, are very clearly stated in Tidd's Pract. 9th edit. 14 to 33, see also Chitty's Col. Stat. 702 to 710, and the recent cases *post*.

(*e*) There is a similar act as to *Ireland*, 10 Car. 1, sess. 2, c. 6.

counts as concern the trade of merchandize between merchant and merchant, their factors or servants,) all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menance, battery, wounding and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed and not after; that is to say, the said actions upon the case, (other than for slander,) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit, within six years next after the cause of such action or suit* and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said action upon the case for words within two years next after the words spoken and not after.

Further time allowed after judgment or outlawry has been reversed.

Sect. 4, nevertheless, enacts, that if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed *by error* or a verdict pass for the plaintiff, and upon matter alleged in *arrest of judgment*, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if any the said actions shall be brought by original, and the defendant therein be *outlawed*, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment be given against the plaintiff or outlawry reversed, and not after.

Exceptions in favour of infants, feme coverts, &c.

Sect. 7, nevertheless, provides and enacts, that if any person or persons that is or shall be *entitled*(*f*) *to* any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case *for words*, (*g*) be or shall be at the time of any such cause of actions given or accrued, fallen or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same

(*f*) This section only applies to the absence of a *creditor* and not of a debtor, *Fladong* v. *Winter*, 19 Ves. 200, and therefore the 4 and 5 Ann. c. 16, s. 19, was passed.

(*g*) It will be observed that *other* actions on the *case* are not re-enumerated in this clause. This it should seem was accidental and not intended, see 4 & 5 Ann. c. 16, s. 19.

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within such times as are before limited *after their coming to* (*h*) or being of full age, discovert, of sane memory, at large, or returned from beyond the seas, as other persons having no such impediment should have done. And a proviso to the same effect was enacted as to the recovery of *seamen's wages* by 4 & 5 Ann. c. 16, s. 18.

Action *against* persons beyond sea may be brought at any time within six years after their return.

The 4 & 5 Anne, c. 16, s. 19, enacts, that if any person or persons (*i*) *against whom* there is or shall be any cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions sur trover or replevin for taking away goods or cattle, or of action of account or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be or shall be, at the time of any such cause, or suit, or action given or accrued, fallen or come, beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act, and by the said other act made in the 21 Jac. 1, c. 16.

Limitation of suits for *Tithes*.

The 53 Geo. 3, c. 127, s. 5, expressly limits suits for the penalty for not setting out *Tithes*, and suits for tithes themselves, whether at law or in equity, to six years, before which act there was no limitation to such proceedings. (*k*)

Enactments of 9 Geo. 4, c. 14, to prevent *verbal* admission except payments being available. (*l*)

The 9 Geo. 4, c. 14, (reciting the English act, 21 Jac. 1, c. 16, and the Irish act, 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and that it was expedient to prevent such questions and to make provision for giving effect to the said enactments and to the intention thereof, enacts, that in actions of debt or upon the case grounded upon any *simple contract*, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said

(*h*) A foreigner who always resides abroad and has never come to England, is not affected by these statutes, *Greig* v. *Somerville*, 1 Russ. & M. 338, 346, n. (*a*).

(*i*) As to one of several persons being absent, see *Perry* v. *Jacob*, 4 Term R. 516; *Sturt* v. *Mellish*, 2 Atk. 612; Chit. Eq. Dig. 664.

(*k*) *Talory* v. *Jackson*, Cro. Car. 513.

(*l*) The decisions on this act will be found in Chitty on Bills, 8th edit. 607 to 613.

enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be *signed by the party chargeable thereby*, (m) and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them. Provided always that nothing herein contained shall alter or take away or lessen the effect of *any payment* of any principal or interest made by any person whatsoever. Provided also that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Sect. 3 enacts, that *no indorsement* or memorandum of any payment, written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange or other writing by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operations of either of the said statutes.

Simple contract debts alleged by way of set-off.

Sect 4 enacts, that the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise. (n)

Memorandum exempted from stamps.

Sect. 8 enacts, that no memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. (o)

Decisions on these acts limiting *Personal* actions. (p)

It has been decided that the statutes of limitations, as regards

(m) So that a signature by an agent is not sufficient, *Whippy* v. *Hillary*, 3 Bar. & Adolp. 399.

(n) It has been previously so decided upon the statute 21 Jac. c. 16, s. 3, *Remington* v. *Stevens*, 2 Stra. 1271; Bul. N. Pri. 180.

(o) Sect. 9 enacts, that this act shall not extend to Scotland, and sect. 10 provides that the act shall commence and take effect on the 1st day of January, 1829.

(p) *Higgins* v. *Scott*, 2 Bar. & Adolp. 413.

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debts and personal actions, merely bars the *Remedy* and not the *debt*, and therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fieri facias* issued against his goods, and the sheriff levied the damages and costs, it was held that the attorney, although he had taken no step in the cause within six years, had still *a lien* on the judgment for his bill of costs, and the court directed the sheriff to pay him the amount out of the proceeds of the goods. (*q*)

What actions, proceedings and claims are within the acts as to personalty.

It will be observed that actions of *Covenant* are not mentioned in the statute 21 Jac. 1, c. 16, and though actions of *Debt* are named, yet the words are actions of debt grounded upon any lending or contract *without Specialty*, consequently it is clear that this Act does not affect actions of *covenant*, which can only be founded upon a specialty under seal, (*r*) and though the statute includes in terms actions of debt for arrearages of rent, yet it is clear that it does not extend to rent reserved by indenture under seal, (*s*) nor to a rent charge. (*t*) So the statutes of limitation *did* not extend to an action of debt for treble the value of the tithes set out, (*u*) though that action is *now* expressly limited at Law as well as in Equity and Ecclesiastical Courts to six years, (*x*) nor did it extend to an action of debt for an escape, (*y*) nor to an action of debt on an award, (*z*) nor debt for a copyhold fine, (*a*) nor to an action against a sheriff for not paying over money under a *fi. fa.* (*b*) It was a maxim at common law that contracts under seal should be dissolved or discharged by an instrument of an equally solemn nature, and therefore, after six years, and any time short of that hereafter noticed, there is no statute of limitations or presumption of payment. But a warrant of attorney is not a specialty. (*c*) Other limitations are proposed to be introduced by a bill now before the houses of parliament. (*d*)

Time how calculated under these acts.

In cases within these acts it has been considered that the day upon or in which the cause of action accrued is to be

(*q*) *Higgins* v. *Scott*, 2 Bar. & Adolp. 413; and see *post*, 766, n. (*p*). See in general Tidd, 9th ed. 14 to 33; Chitty's Col. Stat. 702 to 710, in notes; Tidd on Bills of Exchange, 606 to 613; and Chit. Ed. Eq. Dig. 663 to 665.

(*r*) *The Mayor of Hull* v. *Hornes*, Cowp. 109.

(*s*) *Freeman* v. *Stacy*, Hutton's R. 109; *Leigh* v. *Thornton*, 1 Bar. & Ald. 625; 1 Saund. 38.

(*t*) *Cupit* v. *Jackson*, M'Clel. R. 495; 13 Price, 171, S. C.

(*u*) *Talory* v. *Jackson*, Cro. Car. 513.

(*x*) 53 Geo. 3, c. 127, s. 5.

(*y*) *Jones* v. *Pope*, 1 Saund. 38; 1 Lev. 191.

(*z*) *Semble*, *Hodgson* v. *Harris*, 1 Lev. 273; 2 Saund. 63, *aliter* if submission not under seal.

(*a*) *Hodgson* v. *Harris*, 1 Lev. 273.

(*b*) *Hall* v. *Wybank*, 3 Mod. 312.

(*c*) *Clarke* v. *Figes*, 2 Stark. R. 234.

(*d*) Not yet passed; see Addenda to the last part.

included in the calculation; (*e*) but according to more recent decisions, it should seem that it ought in general to be *excluded*. (*f*) And *as to the expiration*, as the acts require the action to be brought *within* the limited time, it should seem that at least the writ or process should be issued *upon the last* day of the six years, or months, or other time specified, exclusive of the day on which the cause of action accrued.

Cause of action, when considered to have accrued.

There is no *cause of action* till the claimant could *legally sue*, therefore the statute does not run from the making of a promise, if it were to perform something at a *future time*, but only from the expiration of that time, though, if the party promised to pay *on demand*, or *generally*, then he would be liable to be sued immediately he made the promise, (*g*) or committed the breach of duty or wrong, and consequently the statute then begins to run; and the circumstance of the claimant being *ignorant* of the breach of duty or wrong committed, will not *at law* enable the injured party to sue after the expiration of the limited time from the day the breach of duty or wrong took place. (*h*) So at law an action of trover must be brought within six years after a *secret conversion*, although unknown to the owner of the goods. (*i*)

But the term "*cause of action*" implies not only a right of action, but also that there is *some person in existence who could assert it*, and also a person to be *sued*; and therefore where a payee of a bill was dead at the time when it fell due, it was held that the statute did not begin to run until letters of administration had been obtained by some one, (*k*) and where the testator resided and died abroad, it was held that his executor in England might be *sued* within six years after his taking out probate. (*l*) But it would not excuse an attorney for not suing within six years, to show that he had not delivered his bill till within that time, although he is prohibited from suing until a month after such delivery. (*m*) If the statute of limitations once begins to run it continues to do so, and if the cause of action were complete in a testator's life-time, then the

(*e*) *Rex* v. *Arundel*, Hob. 109; *Clarke* v. *Dovey*, 4 Moore, 465; 2 Bla. C. 141, n. 3; *Lloyd* v. *Wisney*, 6 Bing. 489; 1 Burn's J. 805, 806.

(*f*) *Lester* v. *Garland*, 15 Ves. 248; *Pellew* v. *Inhabitants of Wonford*, 9 B. & Cres. 134; *Hardy* v. *Ryle*, Id. 603; *Higgins* v. *M'Adam*, 3 Young & J. 1 & 16; 1 Man. & R. 300, note (*b*); *Pellew* v. *East Wonford*, 4 Man. & R. 130.

(*g*) *Clayton* v. *Gosling*, 5 Bar. & Cres. 360; *Thorpe* v. *Coombe*, 8 Dowl. & R. 346; Chitty on Bills, 8 ed. 608, 609.

(*h*) *Batley* v. *Faukner*, 3 Bar. & Ald. 288; *Short* v. *M'Carthy*, 3 Bar. & Ald. 626; *Howell* v. *Young*, 5 Bar. & C. 259.

(*i*) *Granger* v. *George*, 5 Bar. & Cres. 149; 7 Dowl. & Ry. 729, S. C. See *post*, as to relief in equity.

(*k*) *Douglas* v. *Forrest*, 4 Bing. 686.

(*l*) *Murray* v. *E. I. Company*, 5 Bar. & Ald. 212.

(*m*) *Semble*, *Rothery* v. *Munnings*, 1 Bar. & Adolp. 15; 3 Lev. 367.

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statute begins and continues to run from that time, and not from his death, or the time of obtaining the probate. (n) And it has been held in equity, that if there be a known executor *de son tort*, he must be sued within six years, though there be no rightful executor. (o) In case of a continuing lien, although the statute may be a bar to an action for the debt, it seems that the lien continues. (p) But the statutes equally affect cross demands, and therefore the statute is an answer to a plea of set-off. (q) If a set-off be pleaded, then the plaintiff must reply the statute, (r) but if only a notice of set-off has been delivered, the statute may be given in evidence. (s)

Doubt at law as to exceptions of fraud.

It has been suggested that even *at law* a case might be taken out of the statute of limitations, by showing that the wrong-doer *by fraud* concealed from the party injured the knowledge of the cause of action until after the limited time had elapsed; (t) but the case appears to have been put rather as a possible than a positive exception, and in these cases it seems at least better to resort to a Court of Equity, (u) or by an injunction in that court to prevent the defendant from setting up the lapse of time as a bar. (x)

Infancy, on what day it determines.

Under the clause respecting *infants*, it is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year *next before* the anniversary of his birth; thus, if a person were born at any hour of the first of January, A. D. 1801 (even a few minutes before twelve o'clock of the night of that day,) he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes, because there is in law no fraction of a day, and it is the same whether a thing is done upon one moment of the day or another; (y) and as the party *might* make his will of lands at the first instant of the 31st December, 1821, so he might issue his writ, and the statute of limitations begins to run on that day. (y)

Exemptions beyond sea.

With respect to the exception in favour of persons beyond sea, if a foreigner or other person have never been in England,

(n) *Hickman* v. *Walker*, Willes, 27.
(o) *Webster* v. *Webster*, 10 Ves. 93.
(p) *Spears* v. *Hartley*, 3 Esp. R. 81; and *ante*, 764, n. (q).
(q) *Remington* v. *Stevens*, 2 Stra. 1271, and see express enactment in 9 Geo. 4, c. 14, s. 4, *ante*, 763.
(r) *Remington* v. *Stevens*, 2 Stra. 1271.
(s) Bull. N. P. 180.
(t) *Granger* v. *George*, 5 Bar. & C. 149; 7 Dowl. & R. 729, S. C.; *Howell* v. *Young*, 5 Bar. & C. 259; Tidd, 9 ed. 21.
(u) See *post*.
(x) *Whalley* v. *Whalley*, 3 Bligh's Rep. 2, and *post*.
(y) *Herbert* v. *Torball*, 1 Sid. 162; 1 Keb. 589, S. C.; *Anonymous*, 1 Salk. 44; *Herbert* v. *Tuckal*, Raym. 84; 1 Bla. Com. 463, 464, note (13).

the statute of limitations never commences to operate, (z) and therefore a foreign sovereign, who has never been in England, has a right, even after the lapse of twenty-three years, to come in and prove by his ambassador a debt against the estate of an intestate, part of which still remains in court in consequence of the infancy of the party entitled to the residue, (a) and this notwithstanding successive advertisements and decrees in an amicable suit, (b) but after such delay, the residuary legatee is in equity only liable to bear a relative proportion of the claim. (c)

What *acknowledgment* or *payment* will take a case out of statute as to *personal* actions.

With respect to torts and breaches of special contracts, not for payment of debts, it is clear that no subsequent bare *acknowledgment* can create a new cause of action, and therefore where a tort has been committed upwards of six years, or other limited time, before the commencement of an action, no subsequent acknowledgment within the time will prevent the operation of the statutes as regards an action for such tort. (d) But with respect to *debts*, it has been long held at law, and also in equity, that a bare even verbal acknowledgment, made within six years, that the *debt* remains unsatisfied, raised an implied new promise to pay it, and being within six years, took the case out of the statute, (e) it having been considered that they were only intended to protect persons who, having *paid* their debts, were liable to be called upon to pay them again, in consequence of the loss of vouchers, and that if they admitted that the debt was unsatisfied, the case was not within the intention of the legislature. (f)

Before the late act, a *payment* of a part of the debt, or of the interest, was considered so substantial an admission of continuing liability, that it took the case out of the statute, not only as against the party making the payment, but as to all co-contractors; (g) and a *verbal* acknowledgment also had the same effect, (h) but as that occasioned much perjury in swearing to an explicit *verbal* admission, when perhaps none was made, or it was qualified, the above act 9 Geo. 4, c. 14, was passed,

(z) *Sturt* v. *Mellish*, 2 Atk. 612; *Strihorst* v. *Græme*, 2 Blq. R. 725; 3 Wils. 143, S. C.—N. B. In *Greig* v. *Somerville*, 1 Russ. & M. 338, the Emperor of Russia had been in England, but that was *after* the death of intestate.

(a) *Greig* v. *Somerville*, 1 Russ. & M. 338.

(b) *Lashley* v. *Hogg*, 11 Ves. 602; *Angell* v. *Haddon*, 1 Madd. 529; *Greig* v. *Somerville*, 1 Russ. & M. 338.

(c) *Greig* v. *Somerville*, 1 Russ. & M. 338.

(d) *Hurst* v. *Parker*, 1 Bar. & Ald. 92; *Pittman* v. *Foster*, 1 Bar. & Cres. 256; 2 Dowl. & R. 363, S. C.; 2 Saund. 64, a., note (w); *Boydell* v. *Drummond*, 2 Campb. 160.

(e) 2 Saund. 63, j., note (l).

(f) See observations in *White* v. *Parnther*, Knapp's R. 226; and *Leaper* v. *Tatton*, 16 East, 420.

(g) *Burleigh* v. *Stott*, 8 B. & C. 36.

(h) *Whitcomb* v. *Whiting*, Dougl. 652, 653; *Perham* v. *Raynall*, 2 Bing. 306; *Halliday* v. *Ward*, 3 Campb. 32.

excluding *verbal* admissions, (*i*) and enacting that *a written acknowledgment*, which must be signed by the party making it, shall affect only the *party signing* it and to be charged thereby and not any other person.* Since this act, any *payment* of a part, however small, or a payment of any interest by a single debtor, or by one of several debtors, takes the case out of the statute as to other debtors, and yet such a payment may be as readily sworn as a verbal admission. (*k*) It however is settled, that if such payment be proved, and the evidence be credited by the jury, it precludes all co-contractors, as well as the party who so paid, from setting up the statute. (*l*) But a *payment* by an executor of a co-maker of a promissory note, will not take the case out of the statute as to the survivor. (*m*) And with respect to a *written acknowledgment*, it must contain so explicit an admission of a continuing debt, as to afford a just inference of a promise to pay; (*n*) and if qualified or conditional, the event on which the payment was to be made must be shown to have happened, as where the promise was to pay when able, in which case the ability to pay must be averred and proved. (*o*) A promise in writing to pay the balance due, without naming any sum, is sufficient under this act to take the case out of the statute, though if the only evidence be the writing, and proof of the original cause of action, without showing what was due, the plaintiff can only recover nominal damages. (*p*)

The constructions before the late act was passed as to what ambiguous expressions were sufficient to warrant a jury in inferring a promise, are still applicable to a written admission. It was held, in an action on a promissory note, where the statute of limitations had been pleaded, that a letter, expressed in ambiguous terms, not referring to the note in question, or to any other transaction in particular, was proper evidence to be left to the jury to determine whether it referred to the note, and that if they found it did, then it was a sufficient acknowledgment to take the case out of the statute. (*q*) It must, however,

(*i*) See *White* v. *Pamther*, Knapp's Rep. 226, 227.

(*k*) In practice, since the act, instances have occurred of very suspicious evidence having been given of a pretended small payment, so as to take the case out of the statute.

(*l*) *Bealy* v. *Greenslade*, 10 Law Journ. 1; *Wyatt* v. *Hodson*, 17 April, 1832; K. B.; Chitty on Bills, 8 ed. 803.

(*m*) *Slater* v. *Lawson*, 1 Bar. & Adolp. 396; *Atkins* v. *Tredgold*, 2 Bar. & Cres. 23.

(*n*) *Per* Lord Tenterden, *Tanner* v. *Smart*, 6 Bar. & Cres. 603.

(*o*) *Laing* v. *Mackenzie*, 4 Car. & P. 463; *Tanner* v. *Smart*, 6 Bar. & C. 603; *Scales* v. *Jacobs*, 3 Bing. 638; *Fearn* v. *Lewis*, 4 Car. & P. 173; *Tatlock* v. *Smith*, 6 Bing. 343.

(*p*) *Dickinson* v. *Hatfield*, 2 Mood. & Mal. 141; 5 Car. & P. 46, S. C.

(*q*) *Frost* v. *Bengough*, 1 Law J. 96, C. P. 12 May, 1823; and see *Lloyd* v. *Maund*, 7 Term R. 760; *Rucker* v. *Ha-*

be kept in view, that the written admission must be signed by the party himself, and not by an agent.(r) If the *drawing* of a bill in respect of a prior demand can be considered as a sufficient written acknowledgment of such prior demand within the last act, it must nevertheless be considered as such admission at the time it was *drawn*, and not at a subsequent time, when it was *paid*.(s)

But where a written acknowledgment, in its terms sufficient, has been lost, then, on proof of its having existed, and diligent search and loss, parol evidence of its contents is admissible, and will take the case out of the statute.(t)

It appears to have been considered at Nisi Prius that the statement of an *account*, and striking a balance, and verbally agreeing to the latter within six years, without any signed acknowledgment, is sufficient, because such new account of itself creates a *new cause of action*.(u)

It has been considered that although the debt was contracted abroad, yet if it be sued for here, the English statutes of limitations would apply.(v) The statute must in general be pleaded;(x) but under circumstances, the jury may after twenty years presume payment under the general issue.(y)

Presumption of payment of a Specialty or judgment, &c.

We have seen that there is no statute of limitations affecting debts due on a *specialty* (which are not included),(z) nor debts secured by a judgment or recognizance.(a) But *after twenty years*, if a plea of payment or release be pleaded, the payment or release may be presumed until sufficiently rebutted.(a) But it is said that to warrant such a presumption there must be *full twenty years* from the time when the bond became forfeited.(b) By a bill before parliament, alterations stating the time for suing upon bonds, &c. have been proposed.(c)

Limitation at common law of *certain* actions during life of party injured, or of wrongdoer.

There are some rights the injuries to which must be proceeded for *during the life of the party injured*, or at all events

may, 4 East, 604; *Colledge* v. *Horn*, 3 Bing. 119, 331; *Collyer* v. *Willock*, 4 Bing. 313; *Tatlock* v. *Smith*, 6 Bing. 342; *Kendal* v. *Carpenter*, 2 Young & J. 484; 2 Saund. 61, i., 64, b.; Tidd, 9th ed. 22 to 27; and see *Bailey* v. *Sibbald*, 3 Bing. 185, 5 Ves. 185, as to what is a sufficient admission; see also Starkie on Evid. 892 to 899, 1st ed.

(r) *Whippy* v. *Hillary*, 3 Bar. & Adolp. 399.

(s) *Gowan* v. *Forster*, 3 Bar. & Adolp. 507.

(t) *Haden* v. *Williams*, 7 Bing. 163.

(u) *Smith* v. *Forty*, 4 Car. & P. 127.

(v) *The British Linen Company* v. *Drummond*, 10 Bar. & C. 903; *De La Viga* v. *Vianna*, 1 Bar. & Adolp. 285; *Hawkey* v. *Borwick*, 1 Young & J. 376.

(x) *Drape* v. *Glasssop*, 1 Lord Raym. 153.

(y) *Duffield* v. *Creed*, 5 Esp. R. 52.

(z) *Ante*, 760, 761.

(a) The cases upon this subject are ably collected in Tidd, 9th ed. 18, 19.

(b) *Colsel* v. *Budd*, 1 Campb. 27 *William* v. *Georges*, Id. 217.

(c) See Addenda at end of 4th part.

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during that of the wrong-doer, and to which the maxim applies *actio personalis moritur cum persona*. In case of injuries to the person or reputation this rule always applies, and even in one case of contract, as the breach of promise of marriage. (*d*) But in general the right of action for the breach of a contract survives. (*e*) Alterations of the rule *actio personalis moritur cum persona* have recently been proposed to parliament. (*f*)

Limitation of *Penal* actions. (*g*)

The statute 31 Eliz. c. 5, s. 5, intituled "An act concerning Informers," enacts that all actions, suits, bills, indictments, or informations, shall be had, brought, sued, or exhibited for any forfeiture upon any statute penal made *or to be made*, whereby the forfeiture is or shall be limited to the queen, her heirs or successors only, shall be had, brought, sued, or exhibited *within two years* next after the offence committed against such act penal, and not after; and that all actions, suits, bills, or informations, which shall be had, brought, sued, or commenced for any forfeiture upon any penal statute made or to be made (except the statute of tillage), the benefit and suit whereof is or shall be by the said statute limited to the queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued, or commenced by any person that may lawfully pursue for the same as aforesaid, *within one year* next after the offence committed or to be committed against the said statute, and in default of such pursuit, that then the same shall be had, sued, exhibited, or brought for the queen's majesty, her heirs or successors, at any time *within two years after that year ended;* and if any action, suit, bill, indictment, or information, for any offence against any penal statute made or to be made (except the statute of tillage), shall be brought after the time in that behalf before limited, that then the same *shall be void* and of none effect.

We have seen that a common informer cannot sue unless expressly enabled by statute to do so; (*h*) and as there is *no general act* for that purpose, the particular act imposing the penalty must in general be examined. Penalties imposed by the acts relating to the customs or excise, (*i*) or stamp acts, (*k*) cannot be sued for by an informer, though he may have a proportion of the penalty, or be rewarded; and in most

(*d*) *Chamberlain* v. *Williamson*, 2 Maule & S. 408.

(*e*) This doctrine is here only alluded to, the cases are collected in 1 Chitty on Pleading, Ch. I.

(*f*) See Addenda at end of 4th part.

(*g*) See construction in general, Tidd, 9th ed. 14, 15, and *infra*.

(*h*) *Ante*, 25, n. (*n*).

(*i*) *Fleming* v. *Bailey*, 5 East, 313; 6 Geo. 4, c. 108; 7 & 8 Geo. 4, c. 56, 7 & 8 Geo. 4, c. 53.

(*k*) 55 Geo. 3, c. 184; 48 Geo. 3, c. 149.

of the recent acts imposing penalties on conviction of common assaults and batteries, or of petty larcenies, or injuries to personal or real property, or game, the penalties are to be paid as contributions to the county rate, and not as formerly, for the benefit of the poor of the parish. (l)

In cases affected by the 31 Eliz. c. 5, it extends to all penal actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party suing, whether made before *or since* the statute. (m) It extends to offences of *omission* as well as *commission*. (n) It extends also to actions brought by the common informer alone. (o) But the statute does not extend to actions brought by the *party aggrieved*. (p) A latitat is a good commencement of the suit in a penal action. (q) In an action on 12 Anne, c. 16, (usury,) it was held by the court of sessions, that the limitations in 31 Eliz. c. 5, being understood as incorporated in the British statute 12 Anne, applied to Scotland as well as to England, and that decision was affirmed on appeal. (r) For *indictments* for felonies or other misdemeanors, where there is no forfeiture to the king, or to the king and prosecutor, no time is limited by any statute, but the several acts of general pardon have the effect of a similar limitation, one of the last acts of which kind was that of 20 Geo. 2, c. 52, for certain offences committed before 15th June, 1747. (s)

Limitation of actions against *Justices* of the *peace* and *other public officers*, &c.

With respect to the limitation of actions against *Justices of the peace*, and certain *public officers* of different descriptions, they are numerous, and most inconveniently differ in terms; but being all in *pari materia*, and enacted with the same object, the same principle and rules of construction apply to all. It is to be regretted that no general act has been passed consolidating the numerous provisions, and rendering the language uniform, and enacting some general rules of precise construction. We will state the most general clauses; the others will be found by reference to the antecedent general table. (t)

Justices and peace officers.

The *general enactment* for the protection of *Justices* and *inferior peace officers* is 24 Geo. 2, c. 44, s. 8, "Provided also

(l) *Ante*, 22, 23.

(m) *Barber* v. *Tilson*, 3 M. & S. 434 to 439; *Wynne* v. *Belman*, 5 Taunt. 754; 1 Marsh. 321, note (a), S. C.; *Robinson* v. *Garthwaite*, 9 East, 296.

(n) *Whitehead* v. *Wynne*, 2 Chitty's R. 420; 5 M. & S. 427, S. C.

(o) See Tidd, 8th ed. 13; *Chance* v. *Adams*, 1 Ld. Raym. 78; Bull. N. P. 195.

(p) *Phillips* v. *Bury*, 1 Show. 354; Bull. N. P. 196.

(q) *Johnson* v. *Smith*, 2 Burr. 950; *Morris* v. *Pugh*, 3 Burr. 1243.

(r) *Surtees* v. *Allan*, 2 Dow, 254.

(s) Burn's Justice, tit. Indictment, III.

(t) *Ante*, 738, 739.

that no action shall be brought against any Justice of the Peace for any thing done in the *execution* of his office, or against any constable, headborough, or other officer or person *acting as aforesaid*, unless commenced *within* six calendar months after the act committed." (u)

The acts relating to the *Customs* (28 Geo. 3, c. 37, s. 23, three *lunar* months, (v) and 6 Geo. 4, c. 108, s. 97, six *lunar* months), (v) and to the Excise (28 Geo. 3, c. 37, s. 23, three *lunar* months, (v) and 7 & 8 Geo. 4, c. 53, s. 115, three *calendar* months), (v) and to *Customs* and *Excise* officers acting in the *British possessions* abroad (6 Geo. 4, c. 114, s. 64, three *calendar* months), and to Officers of the *Army*, *Navy*, *Marines*, customs or excise, and any person acting under the direction of the commissioners of his Majesty's *customs* (6 Geo. 4, c. 108, s. 97, six *lunar* months), limit actions against such public officers to different periods, at all events not exceeding six months. It must suffice to refer to the preceding alphabetical table for the other acts, (x) and we will proceed to notice the construction applicable to all these acts in general.

It will be observed that the above acts protect every Justice of the Peace for any thing done "*in the execution of his office*," and *Peace-officers* or *Persons acting in their aid*, and *Revenue-officers*, "*for any thing done by them in pursuance of this act*," *&c.* These expressions, so common in these and numerous other acts, are inaccurate, because they would *primâ facie* mislead, and would import that the party was only protected when he acted *properly*, and according to the authority of law, but the meaning of the words is not thus restricted, for, as frequently observed, if they were, the enactments were useless, because, if the party had acted precisely as the law authorized, he would not stand in need of the protection professed to be given by the enactments. (y) But the acts were intended to protect magistrates, and subordinate officers and others, in all cases where they *intended* to act according to law, but when by accident or *mistake, and not wilfully*, they exceeded or mistook their powers or duty. (z) The statutes suppose some irregularity, in consequence of some excess or want of authority, when the justice or other officer had *reasonable* ground

(u) See general construction, Chit. Col. Stat. 650, note (c).

(v) Mr. Tidd suggests that as 28 Geo. 3, c. 37, s. 23, is still in force, it seems that, notwithstanding 7 & 8 Geo. 4, c. 53, s. 115, an action against an officer of customs or *excise* must still be brought within three *lunar* months, see Tidd, 9th ed. 20, *sed quære*, whether the subsequent acts giving *six* months are not *virtually extensions* of the time.

(x) *Ante*, 738, 739.

(y) *Greenway* v. *Hurd*, 4 Term R. 555; *Weller* v. *Toke*, 9 East, 364.

(z) Id. ibid.; *Beechey* v. *Sides*, 9 Bar. & Cres. 806.

for supposing that the act done by him was in execution of his authority, but it turned out that he had acted erroneously. (*a*) But when there was *no colour* for supposing the act done to have been authorized, and especially when the magistrate *wilfully* acted erroneously, then, upon the same ground as that on which it has been held that it is not necessary to give a justice a notice of action, (*b*) it might be inferred, that an action against him for a case of *flagrant excess*, would *not* be barred by the limitation. It must however be observed, the 8th section of the 24 Geo. 2, c. 44, has been considered *more extensive* in its protection than the 6th section, for by its provision a *constable* is protected from liability to be sued after six calendar months for a trespass, although *manifestly* beyond and not in obedience of a warrant; and it has been said, that it is not necessary to consider, after the expiration of the limited time, whether or not the party acted under colour of his office. (*c*) It seems that at all events the eighth section, limiting actions to six calendar months, protects constables and persons acting in their aid from action for injuries *bonâ fide* committed in execution of their office, although acting without any warrant whatever. (*d*)

In the case of seizures by Officers of the Customs it has been held that the action must be commenced within three months of the actual *seizure*, although a suit be pending to try the legality of the seizure in the Court of Exchequer. (*e*) But when the cause of action is *continuing*, as imprisonment, it is sufficient to show that the action was commenced within the limited time from the expiration of the last day of the imprisonment, at least it would be so as to so much of the injury complained of as has really been sustained within the limited time. (*f*) Though if the plaintiff give notice of action *pending* the imprisonment, he is bound to proceed within the limited time after giving such notice, and cannot in strictness include therein the subequent imprisonment. (*g*) Where *A.* who was

(*a*) *Weller* v. *Toke*, 9 East, 364, and other cases, Chit. Col. Stat. 645, in notes; *Beechey* v. *Sides*, 9 B. & C, 806; *Mills* v. *Collett*, 6 Bing. 85; *Rogers* v. *Broderip*, 9 D. & R. 194.

(*b*) *Cook* v. *Lunard*, and *Lamlar* v. *Miller*, 6 B. & C. 355; *Morgan* v. *Palmer*, 2 B. & C. 729, 4 D. & R. 283, S. C.; *Wright* v. *Horton*, Holt's C. N. P. 458; and see Chitty's Col. Stat. 616, for other cases.

(*c*) *Smith* v. *Wiltshire*, 5 Moore, 323; 2 Brod. & B. 619, S. C.; *Theobald* v. *Chriemore*, 1 Bar. & Ald. 227; *Parton* v. *Williams*, 3 Bar. & Ald. 330

(*d*) *Semble*, see Lord Tenterden's observations in *Parton* v. *Williams*, 3 Bar. & Ald. 330; and *Smith* v. *Willshire*, 5 Moore, 320; and 2 Brod. & B. 619, S.C.; and see *Beechy* v. *Sides*, 9 Bar. & Cr. 806, *sed quære*.

(*e*) *Goden* v. *Flins*, 1 Hen. Bla. 14; *Saunders* v. *Saunders*, 2 East, 254.

(*f*) *Massey* v. *Johnson*, 12 East, 67; *Pickersgill* v. *Palmer*, Bull. N. P. 24.

(*g*) *Weston* v. *Fournier*, 14 East, 491.

entitled by act of parliament to all the surplus water, and such as was not necessary for the purposes of a canal, brought an action against a canal company for an illegal abstraction of water, and alleged in his declaration continuing acts of *commission* and *omission* from an antecedent period, by which he was deprived of the water for nine weeks in the year 1825, and for seventeen weeks in the year 1826, it was held that the company were within the protection of the limitation clause of the statute of 30 Geo. 3, c. 82, s. 79, which enacts, that any action for any thing done in pursuance of the act shall be brought within six calendar months next after the fact *committed*, unless there be a continuation of damage, and also that there was no continuation of damage, inasmuch as there was a *cessation* of injury, although the *cause* from which the injury proceeded was continuing. But it was doubted whether acts of *omission* would be within such limitation clause. (*h*)

Construction of time in these acts, and no exceptions.

It will be observed that these acts for the protection of *Justices* and *Public Officers*, and others acting under the authority of the particular act, do not contain any exception in favor of infants, feme coverts, &c., so that the enactment may be considered imperative upon all persons, without regard to particular disabilities. With regard to the *computation* when the month or other limited time *commences* and expires, it is to be observed, that *formerly* the general rule was that the computation from an act done must *include* the day when it was done, (*i*) though *from* the *day of the date excluded* the day, (*k*) But *now*, at least as to all acts of which a party injured has not *necessarily instant* and immediate notice, the general rule at law, as well as in equity, is to *exclude* the first day, at least when the act was not done to the plaintiff himself, and therefore he might not know of it immediately. (*l*) Thus, although the statute requires that the action shall be brought *within* six calendar months, yet if a party be discharged from an illegal imprisonment upon the 14th of December, the commencement of his action *upon* the 14th day of June following will be in due time. (*m*)

It will be observed that the statutes usually require the

(*h*) *Blakemore* v. *Glamorganshire Canal Company*, 3 Y. & J. 60.

(*i*) *Castle* v. *Burdett*, 3 T. R. 623; *Rex* v. *Tolley*, 3 East, 467; *Norris* v. *The Hundred of Gawtry*, Hob. 139; *Clarke* v. *Davey*, 4 Moore, 465; Tidd, 9 ed. 19.

(*k*) *Watson* v. *Pears*, 2 Campb. 294.

(*l*) *Lester* v. *Garland*, 15 Ves. 248; *Pellew* v. *Wonford*, 9 Bar. & C. 134; *Hardy* v. *Ryle*, Id. 603; *Higgins* v. *M'Adam*, 3 Young & J. 1, 16; 1 Man. & R. 300, note (*b*).

(*m*) *Hardy* v. *Ryle*, 9 Bar. & Cres. 603; as to acts for *omission*, see *Blakemore* v. *Glamorganshire Canal Company*, 3 Young & J. 60, *ante*, 773, 774, n. (*h*).

action to be commenced *within* the specified time, consequently the writ must be issued *on* or *before* the *last day* of the three months or other appointed time, though *exclusive* of the day upon which the injury was committed. (*n*)

The same construction, *excluding* the *first* day, appears to extend to practical matters. Thus, in *scire facias*, the year is calculated *from* the day of signing judgment, *exclusive* thereof; (*o*) and by a late rule of court, in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the *first* day, and *inclusively* of the *last* day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also. (*p*)

With respect to the term *month*, in general when it is used in a statute or law proceedings, with reference to temporal affairs, without the addition of *calendar*, it means a *lunar* month, as well at law (*q*) as in equity, (*r*) but when used with reference to *Ecclesiastical* matters, (*s*) or even in *Mercantile* contracts, (*s*) it means a calendar month. The 7 & 8 Geo. 4, c. 31, requiring certain proceedings against the hundred to be taken, has been construed to be *exclusive* of the day of the demolition. (*t*) When a month's notice of action is requisite, the month begins *upon* the day it is served, and therefore if notice be served on the 28th day of April, it expires on the 27th of May, and the action may be commenced on the 28th of May. (*u*) *Six months* will sometimes be construed to mean *half a year* and not merely six lunar months. (*x*)

2. How far the statutes of limitation operate in Courts of Equity. (*y*)

2. In Courts of *Equity* the general rule is, that although the statute 21 Jac. 1, c. 16, s. 3, and other acts in terms only provide that certain particular "*actions*" for certain particular causes of action shall be brought *within* the times therein men-

(*n*) *Ante*, 765.

(*o*) *Sympson* v. *Gray*, Barnes, 197; Tidd, 9 ed. 1103.

(*p*) Rule 8th, H. T. A.D. 1832, in all the courts.

(*q*) *Lacon* v. *Hooper*, 6 T. R. 224; *Crooke* v. *M'Tavish*, 1 Bing. 307; *Lang* v. *Gale*, 1 M. & S. 111; Chit. Col. Stat. Time.

(*r*) *Creswell* v. *Harris*, 2 Sim. & Stu. 476.

(*s*) *Dyke* v. *Sweeting*, Willes, 588; *Lang* v. *Gale*, 1 Maule & S. 111; *In re Swinford*, 6 Maule & S. 227.

(*t*) *Ante*, 578; and see *Pellew* v. *Hundred of East Wonford*, 4 Man. & Ry. 130; 9 B. & Cres. 134, S. C.; and see *Hardy* v. *Ryle*, Id. 300, in notes; *Wright* v. *Wales*, 5 Bing. 339.

(*u*) *Castle* v. *Burdett*, 3 Term Rep. 623; *Watson* v. *Pears*, 2 Campb. 294. See the construction of the words, "*at least*' one calendar month's notice, &c.;" *Pellew* v. *Hundred of Wonford*, 4 Man. & Ry. 360, in note, and *post*, vol. 2.

(*x*) *The Bishop of Peterborough* v. *Catesby*, Cro. Jac. 167.

(*y*) See in general Chit. Ed. Eq. Dig. Statute of Limitations, 663; 1 Mad. Ch. Pr. 98.

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tioned and consequently only refer to and affect *actions* and proceedings *at law*, and do not mention *bills* or *suits* in *equity*, yet that Courts of Equity, in giving effect to *equitable* claims and affording *equitable* relief, will observe the principle of these enactments in all cases where the *legal* and *equitable* titles to *demands noticed in the acts* correspond and differ only in the court where the right happens to be enforced.(z) And in such cases Courts of Equity act not by *analogy*, as has been supposed, but *in obedience* to the statutes, and upon all legal titles and legal demands Courts of Equity are bound by the statutes,(z) and the statutes of limitations in equity operate in the same manner on equitable estates(a) as the statute would at law have affected the legal estate.(b)

Thus suppose more than six years have elapsed since a bill of exchange became due, and it has been lost, and therefore relief is sought in a Court of Equity, the statute of limitations would be a bar there as much as in a Court of Law, unless there were some circumstances of *fraud* justifying an exception.(c) So where a married woman, indebted in two promissory notes given before her coverture, induced her creditor to give them up and take a bond from her husband for the amount, and he afterwards pleaded infancy, a Court of Equity, upon a bill filed by the creditor, relieved against such fraud and compelled the return of the notes, and prevented the husband and wife from pleading the statute of limitations or any other plea that could not have been pleaded at the time the bond was given.(d) And although Courts of Equity are peculiarly watchful over the interests of infants, yet if an executor or administrator or trustee for an infant should neglect to sue within six years, the statute would be considered by a Court of Equity as binding on the infant there as at law.(e) So although the object of a bill be to obtain discovery from the defendant, to be used at law in order to disprove his plea there that he made no promise within six years, though the defendant is bound to give that discovery, yet he has a right to protect himself in equity by the statute of limitations from making any discovery upon the original constitution

(z) *Medlicott* v. *O'Donel*, 1 Ball & B. 66; *Hovendon* v. *Lord Annesley*, 2 Sch. & Lef. 636; *Stackhouse* v. *Barnston*, 10 Ves. 66, 67; *Johnson* v. *Smith*, 2 Burr. 61.

(a) *Semble*, *Fausseit* v. *Carpenter*, 2 Dow. Rep. N. S. 232.

(b) Id. ibid.; see *ante*, ch. iv. at end of distributions between legal and *equitable interests*, 365 to 373.

(c) Editor's instance.

(d) *Clark* v. *Cobley*, 2 Cox, 173; Chit. Eq. Dig. 664.

(e) *Wych* v. *East India Company*, 3 P. W. 309; *Locken* v. *Lockey*, Prec. Ch. 518.

of the debt, or whether it has been paid, and to such last mentioned matters he should plead the statute, and answer fully the rest of the bill.(*f*)

So although it has been said that the statute of limitation is no bar in equity to an *open account*,(*g*) that must be taken with qualification, for unless there has been an express *trust* or *agreement* to account or an open *mutual* account with some items on one side within six years, the statute will be as much a bar in equity as at law against any item of claim complete upwards of six years before the commencement of the proceedings; and if all accounts have ceased between merchant and merchant above six years, the statute of limitation is clearly a bar in equity, and the court will not decree an account but leave the party to seek his remedy at law.(*h*) But it should seem that as well at law as in equity, and whether the parties be or not merchants then under the exception in the 3d section of 21 Jac. 1, c. 16, if there be mutual and running open accounts *on each side*, but not otherwise, then a new item in either account within six years, takes the whole account on both sides out of the statute; each party in that case being considered as having suspended the application for payment of his side of the demand in faith of the set-off and mutual dealings.(*i*) But when the items are *all on one side*, then the circumstance of one or more items being within six years, will not either at law or in equity take the other prior items upwards of six years old out of the statute.(*k*) So an account of rent and profits was in equity confined to six years by analogy or with reference to the action for mesne profits.(*l*) But as well at law as in equity, if an agent or other person were employed or intrusted to receive goods or money from time to time under an express or implied engagement to account *when requested to do so*, then the statute would only run from the *demand* of an account.(*m*) So a promise or offer to account has before the recent act been considered as entitling the other party to compel an account

(*f*) *Cork* v. *Wilcock*, 5 Mad. R. 331.

(*g*) *Scudamore* v. *White*, 1 Vern. 456; *Anon.* 2 Freem. 22; 1 Mad. Ch. Pr. 98; 2 Mad. Ch. Pr. 310.

(*h*) *Foster* v. *Hodgson*, 19 Ves. 185; *Sherman* v. *Sherman*, 2 Vern. 276; *Barber* v. *Barber*, 18 Ves. 286; 1 Mad. Ch. Pr. 98; 2 Saund. 121; *Martin* v. *Heathcote*, 2 Eden, 169.

(*i*) *Catling* v. *Skoulding*, 6 T. R. 189; *Cranch* v. *Kirkman*, Peake's R. 121; 2 Saund. 124, 127, n.

(*k*) Bull. N. P. 150; *Foster* v. *Hodgson*, 19 Ves. 185; *Catling* v. *Skoulding*, 6 T. R. 189.

(*l*) *Read* v. *Read*, 5 Ves. 744; *Pearce* v. *Newlyn*, 3 Mad. 186.

(*m*) *Topham* v. *Braddick*, 1 Taunt. R.

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notwithstanding six years have expired,(n) and if in writing would doubtless still have that effect.

It is quite clear however that the statutes constitute no bar in Courts of Equity to any *mere equitable* claim or any demand not enumerated or provided for by the before mentioned act. (o) Thus the statute is no bar to a bill for a *legacy*, for which no action would lie, and which is not named in the act; (p) nor is it a bar where money has been lent or delivered upon *trust* property enforceable in equity, (q) and a claim for *tithes* might, before the express statute to the contrary, have been filed at any distance of time, because not a claim or proceeding noticed in the act. (r) And as no claim under a Record, or Specialty, or Will, is even at law affected by the statutes, so suits in equity, with reference to such demands, and for Rent Charges and Annuities created by Deed or Will, may be prosecuted at any distance of time, subject to the qualifications presently noticed. (s)

And in a late case, although the principle and rule that a Court of Equity will not interfere in favour of a party who omits to avail himself of his *legal* remedy in due time, was fully recognized, and it was fully established that a Court of Equity will not interfere to enable an incumbrancer of parish rates to obtain payment of arrears of interest which he had neglected to claim at the time when they became due; (t) yet it was held that clauses in a local act providing, that persons aggrieved by the decisions of the commissioners appointed to carry it into execution, should appeal to the Quarter Sessions, and that 21 days' notice should be given before any action or suit should be commenced for any thing done in pursuance of the act, *did not apply* to the case of a person claiming as an incumbrancer of the rates, which the act gave authority to assess and levy, and instituting his suit in order to give effect to his incumbrance. (u)

Devises for payment of debts.

If there be a *general devise for the payment of debts*, although the property constitutes equitable assets, yet such will is no recognition or revival of debts already barred by the statute *before* the death of the testator, although it was for-

(n) *E. Pomfret* v. *Lord Windsor*, 2 Ves. 485.

(o) 21 Jac. 1, c. 16, s. 3.

(p) *Higgins* v. *Crawford*, 2 Ves. J. 572; *Smallwood* v. *Hamilton*, 2 Atk. 71; Mod. Cases, 25.

(q) *Hollis's case*, 2 Ventr. 345; *Milner* v. *Cowley*, 4 Price's R. 103; 2 Mad. Ch. Pr. 310; *Ex parte Ross*, 2 Glyn & Jam. 281; *Shelden* v. *Wildman*, 2 Ch. Cas. 26; *Heath* v. *Henley*, 1 Ch. Cas. 21; 3 Ch. Rep. 8.

(r) *Warden St. Paul* v. *Bishop of Lincoln*, 4 Price's R. 86; *Marston* v. *Claypole*, Bunb. 213; but now see 53 Geo. 3, c. 127, s. 5. as to *Tithes*.

(s) Chit. Eq. Dig. Account and tit. Limitations, Statute of, *ante*, 778, note (t); Id. 228.

(t) *Drewry* v. *Barnes*, 3 Russ. Rep. 94.

(u) Id. ibid.

merly held otherwise,(x) but such a devise stops the operation of the statute as to all debts *not so previously* barred.(y) So where a deed of trust for creditors generally has been executed,(z) or a commission of bankruptcy issued,(a) the operation of the statute as to all debts not already previously barred is instantly suspended, and entirely ceases to operate, notwithstanding a very great subsequent lapse of time. And when one creditor files a bill on behalf of himself and others against an executor, this will prevent any prospective operation of the statute as to every creditor who afterwards comes in under the decree. (b)

So in cases of *fraud* the operation of the statutes of limitation at law may sometimes be avoided by proceeding *in equity*. Thus if a bill charge *fraud*, and that it was *not discovered* until within six years before filing the bill, the statute cannot be effectually pleaded unless the defendant deny the fraud, or aver that it was discovered more than six years before the filing of the bill;(c) for no length of time can in equity prevent, as it has been figuratively termed, the *unkennelling* of fraud, unless the party after knowledge of it suspends any proceedings for more than six years or other limited time in the statutes of limitations.(c)

It should seem therefore that if an agent or person, entrusted with the care of goods or money, should be guilty of a breach of trust by converting the property to his own use, upwards of six years before any proceeding against him, and such conversion be not discovered till within six years, relief might be obtained *in equity* upon a bill to account, and charging the claimant's ignorance of the fraud till within six years, although it has been held that he could not sustain an action at law.(d)

Presumptions in Equity against demands with analogy to the cases of Presumption at Law.

We have seen that at law, although debts upon records or upon specialties are not within the statutes of limitations, yet, after twenty years, payments will sometimes be *presumed*. (e)

(x) *Burke* v. *Jones*, 2 Ves. & B. 275; *Stratford* v. *Blakesley*, 6 Bro. P. C. 630.

(y) *Hughes* v. *Wynne*, 1 Turn. & R. 307; *Hargreave* v. *Mitchell*, 6 Mad. R. 326; *Turner* v. *Goore*, 1 Scho. & Lef. 107; *Rendell* v. *Carpenter*, 2 Young & J. 484.

(z) Id. ibid.; *Botelor* v. *Marmaduke*, 3 Atk. 459; *Anon.* Id. 313.

(a) *Ex parte Ross, in re Coles*, 2 Glyn. & Jam. 46 & 331, qualifying *Ex parte* Dewdney, 15 Ves. 479.

(b) *Sterndale* v. *Hankinson*, 1 Sim. 393.

(c) *Whalley* v. *Whalley*, 3 Bligh. Rep. 2; Rede's Tr. Pl. 218, 2d ed.; *East India Company* v. *Wymonden*, 3 P. W. 143, 309; *Lacon* v. *Lacon*, 2 Atk. 395; Gill. Ch. 61; 3 Bro. P. C. 305; 1 Mad. Ch. P. 256; 2 Id. 308, 309.

(d) *Granger* v. *George*, 5 Bar. & C. 149; 7 D. & R. 729, S. C.; *Compton* v. *Chandless*, 4 Esp. R. 20; see *Brown* v. *Howard*, 4 Moore, 508; *Short* v. *Hartley*, 3 B. & Ald. 626; *Howell* v. *Young*, 5 Bar. & Cres. 259.

(e) *Ante*, 769.

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Captures.

So with analogy to those decisions, a similar doctrine in some cases obtains in equity. Thus a bill for an account of the produce of captures was dismissed on the ground of laches, although the length of time could not be pleaded in bar. (*f*) So where a party has lain by a great length of time and suffered a personal estate to be distributed he shall not have an account. (*g*) But this depends on the circumstance of each case. (*h*)

But length of time in these cases, not expressly within any statute of limitations, cannot be set up by *demurrer* as a complete bar to a mere *equitable* demand; for length of time in that case operates as a bar not *proprio jure,* but as a fact showing *acquiescence,* and a party cannot avail himself of a mere *inference* from facts on a demurrer; (*i*) but nevertheless, *length of time* may be urged with great effect at the *hearing* of the cause, for it is a rule founded on principles of public and rational policy, that parties shall not by neglecting to bring forward their demands subject others to insuperable difficulties, (*k*) and therefore every *presumption* that can fairly be made will be made against a stale demand. (*k*) Indeed the very forbearance to make a demand is considered as affording a presumption either that the claimant is conscious it has been satisfied or intended to be relinquished. (*l*) Lord Camden said, "a Court of Equity, which is never active in relief *against* conscience or public convenience, *has always* refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence, where these are wanting the court is passive and does nothing. Laches and neglect are always discouraged, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." (*m*)

Where therefore a party has lain by for a great length of time and suffered an estate to be distributed, he cannot insist

(*f*) *Pearson* v. *Belcher*, 4 Ves. 627.

(*g*) *Hercy* v. *Dinwoody*, 4 Bro. C. C. 257, *post*, 781, note (*n*.)

(*h*) See cases, Chit. Eq. Dig. Account, 13, 19, and tit. Laches, Length of Time and Limitations, Statute of.

(*i*) *Doleraine* v. *Brown*, 3 Bro. C. C. 633; in *Hovendon* v. *Lord Annesley*, 2 Sch. & Lef. 637, 638, Lord Redesdale objected to that decision, but in the 3d edit. of his Pleadings, 173, 174, he appears to have concurred

(*k*) *Hercy* v. *Dinwoody*, 4 Bro. 268; and see the reasoning in *White* v. *Parnther*, Knapps' R. 226, *ante*, 741, 742.

(*l*) *Pickering* v. *Lord Stamford*, 2 Ves. jun. 280, 582, 583; and see *Doleraine* v. *Brown*, 3 Bro. C. C. 633; and *Higgins* v. *Crawford*, 2 Ves. jun. 572; *Brownell* v. *Brownell*, 2 Bro. C. C. 63; and see *Sturt* v. *Mellish*, 2 Atk. 610.

(*m*) *Smith* v. *Clay*, Amb. 645; but see judgment more fully reported, 3 Bro. C. C. 639, in note taken from Lord Camden's note-book, 2 Sch. & Lef. 631; and see *Lacon* v. *Briggs*, 3 Atk. 105; *Hovendon* v. *Lord Annesley*, 2 Sch. & Lef. 630; *Rigby* v. *Macnamara*, MS., 2 Cox, 415; 1 Madd. Ch. Pr. 100.

on an account. (n) But on the other hand, there are cases in which, although parties would not be called upon to *refund* what has been applied, yet the accounts being clear, relief has been given, notwithstanding great length of time has elapsed. (o) In one case an account was directed after even thirty years' acquiescence. (p)

Pendency of bill, its operation.

It is settled that the mere pendency of a bill in Chancery against the claimant is not sufficient to take the debt out of the statutes of limitations, (q) and so it is where the bill is dismissed. (r) But it is said that if a party be stayed by injunction it is otherwise, and it has been considered that where the statute has run by retention of a bill or otherwise in a Court of Equity, the court will not allow the statute to be set up. (t) But it should seem that unless the court has *previously* directed that the statute shall not be set up at law, it will not afterwards entertain a bill or application for that purpose; (u) and therefore the claimant should make a proper application to the Court of Equity pending the proceedings and *before* the statute has barred the remedy at law; or he should take care and issue and continue proper proceedings at law.

Pleading, &c. statute in Equity.

It is laid down that no advantage can be taken of the statute of limitations in Equity, unless it be *pleaded* or insisted upon by the answer. (x) But in case of a bill to redeem a mortgage and for an account, if it appear upon the face of the bill that the mortgagee has been in possession twenty years, the defendant may *demur*. (y) And it should seem that if, since the 9 Geo. 4, c. 14, a bill should charge that there was a payment or a *written* acknowledgment of a debt within six years, although lost, a mere plea of the statute would in equity be insufficient; (z) but that such charges in the bill of payment or ac-

(n) *Hercy* v. *Dinwoody*, 4 Bro. 257; and see *Smith* v. *Clay*, 3 Bro. C. C. 539, in n.; S. C. Ambl. 645, but not so full; see also *Doleraine* v. *Browne*, 3 Bro. C. C. 646; *Baskerville* v. *Brain*, 24 February, 1804, MS., 1 Mad. Ch. Pr. 106; but the case of *Greig* v. *Somerville*, 1 Russ. & M. 338; *ante*, 767, n. (a); where the ambassador of the Emperor of Russia was allowed to prove a debt before *actual and ultimate* distribution after very great delay, but still his right was qualified.

(o) As in *Pickering* v. *Lord Stamford*, 2 Ves. 581; see *Astrey's case*, 2 Freem. 55.

(p) *Lord Kingsland* v. *Lady Tyrconnell*, 17 Feb. 1734, Dom. Proc. Lord Harcourt MS. Tables; see case in last note, and 1 Mad. Ch. Pr. 100, 106.

(q) *Anon.* 2 Atk. 1; *Dormer* v. *Fortescue*, 282; *contrà*, *Anon.* 1 Vern. 73, but which an experienced counsel at the Equity bar recently advised was clearly not law, and directly at variance with the better authorities of *Hurdret* v. *Caluden*, 1 Ch. Rep. 214; *Craddock* v. *Marsh*, Id. 205; *Peerer* v. *Bellamy*, Id. cited 2 Vern. 504; *Lake* v. *Hayes*, 1 Atk. 282, and 2 Atk. 1.

(r) *Anon.* 2 Ch. Cas. 217, recognized in *Pulteney* v. *Warren*, 6 Ves. 79; and see *Sturt* v. *Mellish*, 2 Atk. 610.

(s) Ibid.; 2 Mad. Ch. Pr. 310; *Mackenzie* v. *Powis*, 4 Bro. P. C. 328.

(t) *Sirdefield* v. *Price*, 2 Young & J. 73, 75; *Sturt* v. *Mellish*, 2 Atk. 615, and *supra*, note (r); *Pulteney* v. *Warren*, 6 Ves. 79; *Grant* v. *Grant*, 3 Russ. 609.

(u) *Prince* v. *Heylin*, 1 Atk. 493.

(x) Id. ibid.

(y) *Hardy* v. *Reeves*, 5 Ves. 426; 1 Mad. Ch. Pr. 519; 2 Id. 310; *sed quære*, for in answer to a plea, an acknowledgment might be replied, 1 Mad. Ch. Pr. 520, 521.

(z) *Haydon* v. *Williams*, 7 Bing. 163; *College* v. *Horn*, 3 Bing. 121: *Baillie* v. *Sibbald*, 15 Ves. 185.

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3. In *Bankruptcy*.

3. It has been considered that a debtor to a *bankrupt* cannot set up the statute of limitations as a bar to a petitioning creditor's debt in an action at the suit of the assignees against such debtor; (*b*) but, on the other hand, it has been decided that a debt which could not be recovered in an action in consequence of the statute of limitations having *already* barred the same, will not be sufficient to support a commission or be proveable under it. (*c*) And unless a debt due from the bankrupt has been barred by the statute of limitations before the bankruptcy, it should seem that as a commission of bankruptcy creates a trust for all the then subsisting creditors, the statute of limitations would, immediately upon the issuing of the commission, cease to operate, so that no subsequent lapse of time, however considerable, would operate as a bar or defeat the right of each creditor to receive a dividend in respect of his debt.

4. Executors pleading statute.

4. It appears to have been considered, with analogy to a decision upon the statute against frauds, that an *executor* is not bound to avail himself of the statute of limitations, and that he may pay a debt although already thereby barred, (*d*) provided the demand be otherwise well founded; (*e*) and that an executor is not compellable to plead the statute in aid of the residuary legatee. (*f*) But it should seem that if he has reason to believe that the claim has been satisfied, he should, in the fair exercise of his trust, by such a plea afford the estate that protection which the law intended where claims remain unrecognized for more than six years, (*g*) and at the instance of another creditor, or legatee or next of kin, it should seem that an executor may be compelled to plead the statute. (*h*) We have seen that an executor may retain for a debt due to himself, although all legal remedy would have been barred if he had been put to his action, unless it could be shown that the debt had really been satisfied. (*i*)

(*a*) *Bayley* v. *Adams*, 6 Ves. 586; in Redesd. Tr. Pl. 219, 3d edit. it is said that there must be an averment and an answer; see *Anon.* 3 Atk. 70; and 2 Mad. Ch. Pr. 510.

(*b*) *Mavor* v. *Pyne*, 3 Car. & P. 91; *Gregory* v. *Hurrill*, 5 B. & Cres. 341; *Quantock* v. *England*, 5 Burr. 2630; *Ex parte Dewdney*, 15 Ves. 491, 493, 494.

(*c*) *Ex parte Dewdney*, 15 Ves. 479, 498; but see qualification, *Ex parte Ross*, *in re Coles*, 2 Glynn & J. 333; Chitty on Bills, 8th edit. 679—681.

(*d*) 2 Mad. Ch. Pr. Index, tit. Limitations; and *Buckmaster* v. *Harrop*, 7 Ves. 341; 13 Ves. 427; 1 Mad. Ch. Pr. 368, note (*i*).

(*e*) *Norton* v. *Frecker*, 1 Atk. 526; *ante*, 530, n. (*o*).

(*f*) *Lord Castleton* v. *Fanshaw*, 1 Eq. Abr. 305.

(*g*) And see *ante* 778, 779, as to a general devise to pay debts not taking an already barred debt out of the statute.

(*h*) *Ante*, 530.

(*i*) *Ante*, 534, 535.

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5. Limitations of proceeding in *Ecclesiastical* and *Spiritual Courts.*

5. Independently of any statute of limitations, the death of the wrong-doer is in general a determination of any right to proceed in an *Ecclesiastical Court*, because the proceedings there are ***in personam pro salute animæ or animarum;*** as in case of an unlawful incestuous marriage, and enjoins the offender to perform a public penance in presence of the congregation. (*k*) And no such divorce can be obtained excepting during the life of the parties, (*l*) though a sentence of divorce may be *repealed* or *annulled* in the Spiritual Court after the death of the parties; (*m*) and though if a divorce take place during the joint lives, on account of the marriage having been incestuous, the children of the marriage are illegitimate; (*n*) it is otherwise if one of the parties to such marriage die before sentence pronounced. (*o*)

The 27 Geo. 3, c. 44, intituled, " An Act to prevent frivolous and vexatious suits in Ecclesiastical Courts," after reciting that it is expedient to limit the time for the commencement of certain suits in the Ecclesiastical Courts, enacts " that no suit for Defamatory *Words* shall be commenced in any of the Ecclesiastical Courts within England, Wales, or the town of Berwick-upon-Tweed, unless the same shall be commenced within *six calendar months* from the time when such defamatory words shall have been uttered;" and the 2d section enacts, " that no suit shall be commenced in any Ecclesiastical Court for ***Fornication*** or ***Incontinence,*** or for *Striking* or ***Brawling*** in any Church or Church-yard, after the expiration of *eight calendar months* from the time when such offence shall have been committed; nor shall any prosecution be commenced or carried on for Fornication at any time after the parties offending shall have been lawfully intermarried." But it has been recently determined that a Spiritual Court, notwithstanding this statute, may take cognizance of charges of fornication or incontinence against clergymen after the expiration of eight months from the time of commission, with a view to suspension, or deprivation or other punishment *merely clerical.* (*p*)

6. Limitations of actions respecting Tithes.

6. We have seen that no *action* can be brought for the recovery of any *penalty* for the not setting out *Tithes;* nor any ***suit*** instituted in any Court of Equity, or in any ***Ecclesiastical***

(*k*) *Blackmore* v. *Bryder*, 2 Phil. Ecc. Cases, 362.

(*l*) 1 Bla. C. 440, *infra*, note (*o*).

(*m*) Co. Lit. 33, 244; *Kenn's case*, 7 Co. 44; *Bury's case*, 5 Co. 98; but see *Robertson* v. *Lady Stallage*, Cro. J. 186.

(*n*) Co. Lit. 235.

(*o*) *Robertson* v. *Lady Stallage*, Cro. Jac. 186; *Kenn's case*, 7 Co. 43.

(*p*) *Free* v. *Burgoyne*, 1 Dow. Rep. New S. 115; 5 Bar. & Cres. 400; and 8 D. & R. 179, S. C.

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Court, to recover the value of any *Tithes*, unless such action shall be brought, or such suit commenced, within *six years* from the time when such tithes became due. (*q*)

7. Limitation of suits in the *Admiralty Courts.*

7. Suits in the *Admiralty Court* for *Seamen's Wages* not having been provided for by, nor construed to be within any prior act, (*r*) it was enacted by the 4 Ann. c. 16, s. 17, that all suits and actions in the Court of Admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suit or actions shall accrue, and not after, with a proviso in favour of persons beyond sea, and infants, &c. as before mentioned, relating to personal actions.

8. *Indictments* and *Summary* proceedings for crimes before magistrates.

8. In general there is no limitation of *Indictments* or *Criminal Proceedings*, which being on the behalf of the king are not considered to be *actions* or *suits* within the meaning of these acts. (*s*) And there have been instances of conviction and capital punishment even for murder more than twenty years after the offence was committed, (*t*) and no length of time can legalize a public nuisance; (*u*) but the long continuance of a public nuisance, though not strictly a bar to a criminal proceeding, may nevertheless be strong ground for urging, and for a jury's presuming that it was originally no nuisance, and that it became so only by persons voluntarily becoming inhabitants in the neighbourhood, for otherwise why has it been suffered so long to continue? (*x*) There are, however, some express limitations, as three years for prosecution for treason, unless against the king's life, (*y*) and some other instances. (*z*)

With respect to *Small Offences*, over which *summary* jurisdiction has been given to justices and others, the modern acts generally limit the times of the proceeding. Thus the larceny act, (*a*) the wilful and malicious trespass and injury act, (*b*) the act against wilful or malicious injuries to the person, (*c*) and the act for protection of game, (*d*) and against an hundred, (*e*) require the *summary* proceeding to be *commenced* within *three calendar* months.

(*q*) 53 Geo. 3, c. 127, s. 5, *ante*, 762; and *Talory* v. *Jackson*, Cro. Car. 513.

(*r*) *Ewer* v. *Jones*, 3 Salk. 227; 2 Lord Raym. 934, S. C.; *Hyde* v. *Partridge*, Id. 1204; *Hall* v. *Wyb*, 2 Salk. 421; Tidd, 9 ed. 16.

(*s*) 2 Hale, 158; Burn, J. Indictment.

(*t*) *Lieut. Col. Wall's case*; 4 Bla. C. 305, n. 2.

(*u*) *Weld* v. *Storney*, 7 East, 199; *Rex* v. *Cross*, 3 Campb. 227; *Rex* v. *Smith*, 4 Esp. R. 109; but see *semble, contrà*, *Rex* v. *Neville*, 1 Peake, C. N. P. 91.

(*x*) *Rex* v. *Neville*, 1 Peake, C. N. P. 91.

(*y*) 7 Wm. 3, c. 3, s. 5 & 6.

(*z*) Not attending church, &c. 1 East's P. C. 18, 186, 187; Indictments on Penal Statutes, 31 Eliz. c. 5; and see Russ. & R. C. C. 639.

(*a*) 7 & 8 Geo. 4, c. 29, s. 64.

(*b*) Id. chap. 30, s. 29.

(*c*) 9 Geo. 4, c. 31, s. 34.

(*d*) 1 & 2 Wm. 4, c. 32, s. 41.

(*e*) 7 & 8 Geo. 4, c. 31, s. 3.

In cases when the time for adopting a civil remedy for an injury has expired, if the injury were also indictable, then the party may still be punished by indictment, although, after a considerable lapse of time, it would scarcely be expedient to institute such proceeding. An exception might occur, as that of a person holding a foreign situation having been libelled just before he left England, and he did not hear of it for more than six years after, or could not conveniently bring his action before his return, and yet in that case the statute would run against a civil action, because he was actually in England at the time the libel was published. In such a case he might with propriety indict for the libel, and thus prevent the calumniator from totally avoiding punishment.

9. Consequences of *Laches*, or great lapse of time *independently* of the statutes of limitation. (*f*)

9. Although in all cases affected by the statute of limitation, they impliedly authorize and enable a party to sue at any time within the prescribed periods, yet if he wait till the last moment his claim will frequently *not be favoured*, but treated by a court and jury as stale, especially in cases of injury to character or feeling. Other cases also occur not affected by the statutes of limitations, and when it will be found that, as well at *law* as in *equity*, and in the Admiralty, Spiritual, and other courts, *laches* or great *lapse of time* will at common law *prejudice*, and sometimes operate in bar of a remedy which it is discretionary and not compulsory in the court to afford.

Thus in *Courts of Common Law* a motion for an *Irregularity* in the proceedings must be made in the first instance, or it will be too late to object; (*g*) and motions for *Criminal informations* against a magistrate for misconduct in the execution of his office, ought in general to be moved for within the *first term* after the supposed offence, though, where no assizes have intervened, it may be moved for in the *second term*, provided it be not so late in the term as to preclude the magistrate from the opportunity of showing cause against it in the same term; (*h*) and where *twelve months* have elapsed, the court will not interfere, but leave the party complaining to indict, though he only recently became acquainted with the crime. (*i*) And, though the rules observed by the court respecting the time of moving for a cri-

(*f*) See in general the observations in *White* v. *Parnther*, Knapp's Rep. 226.

(*g*) *Ballantyne* v. *Wilson*, Forrest's Rep. 51; *Wickham* v. *Mealing*, 2 Price R. 9; Chitty's Prac. 96 to 99, 381; *Dal[illegible]* v. *Barnes*, 1 M. & S. 230; *D'Argent* v. *Vivant*, 1 East, 330; *Shauman* v. *Whalley*, 6 Taunt. 185.

(*h*) *Rex* v. *Smith*, 7 T. R. 80; *Rex* v. *Harris*, 13 East, 270; *Rex* v. *Smith*, Id. 322; Tidd, 498.

(*i*) *Rex* v. *Bishop*, 5 B. & Ald. 612.

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minal information apply in strictness only to *magistrates*, a prosecutor should in every case bring his accusation before the court as early as possible, because any delay which he is unable to explain will operate greatly to his prejudice, and sometimes even induce the court to refuse the application. (*j*) These are only a few of the very numerous instances in which delay will prejudice at law, independently of any statute of limitation, and which will be noticed in the next volume. (*k*)

In *Courts of Equity* also delay will generally prejudice; thus if there be laches in seeking relief where a *Trustee* has purchased the trust property, (*l*) or otherwise to impeach a sale by him, (*m*) or in applying to the court for *Specific performance* of an agreement, (*n*) the court will refuse the required relief. In the latter case Lord Alvanley held, that a party cannot call upon a Court of Equity for a specific performance, unless he has shown himself "*ready, desirous, prompt, and eager.*" (*o*) And we have seen instances where even a day or two's delay in filing a bill or moving for an injunction, would induce the court to refuse it. (*p*) But a party's resting or remaining in *possession* passive and contented upon an *equitable* without clothing himself with the *legal* title has never been held to be such laches as to preclude relief, or enforce specific performance of an express or implied contract to convey the legal title. (*q*) And we have seen, that in cases of *fraud*, it suffices in equity if the party defrauded seek his remedy there within the statutory limitations *after* he has discovered the fraud and the cause of complaint; (*r*) and Courts of Equity, in cases not within the positive enactment of the statutes, consider the absence abroad of the claimant, whilst serving in the army, a reasonable excuse for delay. (*s*)

(*j*) *Rex* v. *Robinson*, 1 Bla. R. 542; *Rex* v. *Bishop*, 5 B. & Ald. 612.

(*k*) And see *ante*, 737, 738, and next chapter as to the time of applying for a Mandamus or Bill for Specific Performance; and *Rex* v. *Cockermouth*, 1 Bar. & Adolp. 378; and *infra*, notes (*l*), (*m*), (*n*).

(*l*) *Webb* v. *Rooke*, 2 Sch. & Lef. 672; *Campbell* v. *Walker*, 5 Ves. 678; *Whithcote* v. *Lawrence*, 3 Ves. 740, but see *Attorney-General* v. *Dudley*, Coop. 146; 1 Mad. Ch. Pr. 114.

(*m*) *Chalmer* v. *Bradley*, 1 Jac. & Walk. 59.

(*n*) 1 Mad. Ch. Pr. 415, 416.

(*o*) *Milward* v. *Earl Thanet*, 5 Ves. 720, and see *Guest* v. *Hunfray*, 5 Ves. 818, and 1 Madd. 415 to 418, for instances where relief was refused.

(*p*) *Ante*, 717, note (*q*), and 719, (*b*).

(*q*) *Crofton* v. *Ormsley*, 2 Sch. & Lef. 604.

(*r*) *Ante*, 766, 779.

(*s*) *Mullins* v. *Townsend*, 2 Dow. R. N. S. 430.

CHAPTER X.

OF THE REMEDIES TO COMPEL SPECIFIC RELIEF OR PERFORMANCE, AND IN PARTICULAR OF WRITS OF MANDAMUS AND BILLS FOR SPECIFIC PERFORMANCE.

Of Specific Relief in general:
I. Respecting the Person, and Rights of Persons.
1. At Law in general.
By Mandamus fully.
2. In Equity.
3. In Ecclesiastical and other Courts.
II. Respecting Personal Property.
1. At Law.
2. In Equity.
3. In Ecclesiastical Courts.
4. In Prize Courts, &c.
III. Respecting Real Property.
1. At Law.
2. In Equity.
IV. Bills and other Proceedings for Specific Performance.
1. The General Rules and Practice as to Bills for Specific Performance of Contracts.
2. Relating to the Person.
3. Relating to Personal Contracts.
4. Relating to Real Property.
5. The Practice in General.
V. Bills to Account, &c.

IN the preceding chapters our attention has been confined to the *Prevention of* Injuries, and although we have examined the cases where a party may escape, or be rescued, or may retake his wife, his child, or his personal or real property, and may remove imprisonment by habeas corpus, we have not as yet fully considered the other numerous instances in which a party may obtain *Specific Relief or Specific Performance.* We will, therefore, in this chapter suppose, that an injury or breach of contract is complete, and that the party injured would prefer *specific relief* or performance in preference to mere *Compensation in damages or punishment.*

Of *Specific Relief* in general, and when, and how, and in what court to be obtained, whether as regards the person, or personal or real property.

It will be obvious that in many cases a party injured would prefer to be *restored to precisely the same situation* in which he stood before the injury was committed, or to be *placed in that* which another party, for valuable consideration, has engaged he should be, and that when that is practicable, it is the best measure of justice to enforce it, and that the merely giving damages in lieu of the restoration of the person of the relative, or of the chattel, or the land, would be very inadequate, and encourage the rich and powerful by force or fraud to take from the poor his property, and then merely to pay him the value. In general the common law action of *Detinue* or *Replevin* enables the owner to recover possession of the specific chattel wrongfully detained, and a Court of Equity will, upon a bill filed, also compel the delivery of an heir-loom or specific legacy, and compel the performance of certain substantial contracts, such as a contract to convey land, &c. These are only a few instances, and it will be necessary fully to examine the general principles and rules, and some of

CHAP. X. SPECIFIC REMEDIES, &c.

the leading instances in which courts will interfere and afford specific remedies. It seems expedient to arrange the subject as in other instances, viz. as relates to 1st, The *Person*, and Personal Rights absolute and relative. 2dly, *Personal* Property and Contracts. And 3dly, As regards *Real* Property: under each considering the specific remedy at *Law*, then in *Equity*, then in the Ecclesiastical and Spiritual Courts, and lastly in the Admiralty or Prize Courts. But as regards the remedy by *Mandamus* at law, or by bill for *specific performance* in equity, these being of *great practical importance*, will be fully considered.

I. Respecting the person, absolute and relative.

I. As respects the *Person* and the *absolute* rights, the *specific* remedy for false imprisonment, we have seen, is a writ of *Habeas Corpus*, or summary application for release from imprisonment. But there are some few private rights, principally of the person, the violation of which may be remedied by writ of *Mandamus*, the nature and application of which will be presently stated.

As respects the *Relative* rights of *Persons*, we have seen in what instances Courts of Law or Equity will interfere to afford specific relief, viz. restoration of the *Person* of the Relative, whether wife, child, apprentice, or servant, and which is usually by writ of Habeas Corpus. (*a*) But a guardian may obtain restoration of his ward by petition, without filing a bill. (*b*)

Formerly also a contract to *marry* might have been *specifically* enforced, but at length the legislature wisely considering that the greatest misery would probably ensue from a forced union, enacted that no bill in Equity, or suit in the Spiritual Court, shall be sustainable to compel marriage, (*c*) and the party complaining of a breach of such engagement can only sue at law for damages; and even then the contract is considered so personal, that the executors of a female, to whom a promise of marriage has been made, cannot sue, and the remedy dies with the person. (*d*) But if the contract of marriage has been legally *completed*, according to the *lex loci*, where the ceremony was performed, then the Ecclesiastical or Spiritual Court will enforce specific observance of the resulting duties, by entertaining a suit at the instance of the husband or the wife, for the *restitution of conjugal rights*; and though, in fact, there is no pos-

(*a*) *Ante*, 684 to 695.

(*b*) *Wright* v. *Naylor*, 5 Madd. R. 77; 1 Newl. Ch. Pr. 211.

(*c*) 4 Geo. 4, c. 76, s. 27; 1 Bla. Com. 433.

(*d*) *Chamberlain* v. *Williamson*, 2 Maule & Selw. 408.

sibility of strictly compelling specific performance of duties, according to the *spirit* of the sacred vow, yet if the party continue disobedient to the sentence of the court, he or she will be in contempt, and may be perpetually imprisoned until observant, and instances of which have sometimes, though rarely, resulted from the proceeding. Suits of that nature involve all the questions that can arise, not only upon the legality of the marriage, but also upon any collateral question, whether the husband or the wife has by adultery or such gross cruelty or infamous conduct forfeited the matrimonial rights, and the ultimate decree will depend on those circumstances. The practical mode of conducting such a suit will be fully considered when we treat of the jurisdiction and practice of the Ecclesiastical Courts.

What Rights of the *Person* may be enforced by Writ of *Mandamus* in the Court of K. B.

There are, as we have just suggested, some *private* rights, principally of the *Person*, the specific enforcement of which may be secured by *writ* of *Mandamus*, which commands the completion or restitution of the right. The power of issuing writs of *Mandamus* is one of the highest and most important branches of the jurisdiction of the Court of King's Bench, and in general exclusively belongs to that court, (*e*) and figuratively it has been treated as its *principal flower*, and it may be compared to a *Bill in Equity* for a *specific performance*. (*f*) It is used, however, by that court *principally* for *public* purposes, and to enforce performance of *public* Rights or *Duties*, and generally speaking, it is issued *only* to enforce a *public Right* or a *public Duty*; and therefore the court will not grant a mandamus to a trading corporation at the instance of one of its members, to compel them to produce their accounts for the purpose of declaring a dividend of the profits. (*g*) And Abbott, C. J. said, "This is an application for a Mandamus to a trading corporation, at the instance of an individual member, to compel the directors of that corporation to produce their accounts and divide their profits: it is in effect, an application on the behalf of one of several partners, to compel his copartners to produce the account of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the Court of Chancery, but this court is a very unfit tribunal for

(*e*) A mandamus to examine witnesses in India, given by 13 Geo. 3, c. 63, s. 44, and which may be issued at the instance of a plaintiff or defendant out of *any of* the courts at Westminter, constitutes a statute exception.

(*f*) *Andoley* v. *Joye*, Poph. 176. The general practice relative to writs of mandamus will be considered in the next volume. See who in general, 2 Selwyn, Ni. Pri. 6th ed. 1061; Comyn. Dig. Mandamus; and Impey on Mandamus.

(*g*) *Rex* v. *Bank of England*, 2 Bar. & Ald. 620; *Rex* v. *London Insurance Company*, 5 Bar. & Ald. 899; and see *Anon.* 2 Ld. Raym. 989.

such a subject. A mere trading corporation differs materially from those which are entrusted with the *government* of cities and towns, and therefore have important *public* duties to perform. No instance has been cited in which the court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent." And Bayley J. said, "The court never grant this writ except for *public purposes*, and to compel the performance of *public* duties. This is an application at the instance of one of several partners in a trading company, to compel his co-partners to divide their profits; but that is a mere *private* purpose and presents a fit subject for enquiry on the other side of the hall. There is no instance in which the court have granted a mandamus to a trading corporation; and that being so, I think that we should not now grant it for the first time." Nor does a mandamus lie to an Insurance Company to *transfer* shares standing in the name of a bankrupt into the names of his assignees. (*h*) But if there be a *public duty* to enforce, then the writ may be directed to the *inhabitants of a parish*, in case there be no standing officer. (*i*)

However, a writ of mandamus does operate, and most powerfully and extensively, in affording specific relief, and enforcing some *Private Rights*, when they are withheld by a *Public Officer*, (*j*) and though principally for the *admission* or *restitution* to a *Public office*, yet it extends to other rights of the person or property.

It is another general rule, that this writ is only to be issued where the party has *no other specific remedy*; and for that reason the court refused a mandamus to a bishop to license a curate, because the latter had another specific remedy by *quare impedit*. (*k*) And on the same ground a mandamus to the bank to transfer stock, was refused, because the party might recover the value in an action of assumpsit. (*l*) And, although in the case of a *clear public* right, if it be important to prevent great and *immediate* public damage or inconvenience to many persons, that the court should *immediately* interfere, as in case of a public bridge, or other work, being in a very dangerous state, and requiring immediate repair or support, if there be no doubt respecting the obligation to repair, a mandamus may be issued, although there be another remedy by

(*h*) *Rex* v. *London Assurance Company*, 1 Dowl. & R. 510; 5 B. & Ald. 899, S.C.

(*i*) *Rex* v. *Wix*, 2 Bar. & Adolp. 197; and *Rex* v. *Greenwich*, S. P.

(*j*) Per Buller, J. in *Rex* v. *Bishop of Chester*, 1 Term Rep. 404; *Rex* v. *Marq. of Stafford*, 3 Term Rep. 652; *Rex* v. *Bank of England*, Dougl. 526; and see *Rex* v. *Justices of Cambridgeshire*, Id. 325; *Rex* v. *Bristol Dock Company*, M. 52 Geo. 3, S. P.; Selwyn, Ni. Pri. 6th ed. 1072.

(*k*) *Rex* v. *Bishop of Chester*, 1 Term Rep. 396.

(*l*) *Rex* v. *Bank of England*, Dougl. 523.

indictment. (*m*) Yet, if the right or the obligation be doubtful, the court will refuse the writ, and leave the prosecutor to proceed by indictment. (*n*) And in general, to induce the court to interfere, there must be not only a *specific legal right*, but also the *absence* of any other *specific legal remedy*, in order to found an application for a mandamus. (*o*)

Further, it is not be considered a writ of *Right*, (*p*) but it is in the discretion of the court to grant it, and as no writ of error lies, it is a jurisdiction to be exercised with great caution. (*q*)

Another rule is, that the court will not interfere by mandamus after considerable delay, and where the party applying for it has slept on his right, and allowed perhaps *other rights* to grow up; or a disposal of the fund out of which the claim ought originally to have been perfected. And therefore, where allotments were set out under an inclosure act to a party claiming them, and possession given in or about 1817, and there was no road to them, nor any access but through allotments made or land sold under the act to other persons, on motion, twelve years afterwards, (viz. in 1829), for a mandamus to the commissioners (who had not yet published their award) to set out an occupation road to the first mentioned allotments, the court held that the application came too late; and Bayley J. mentioned a case (*r*) where a motion was made in 1813 for a mandamus, directing the commissioners under a canal act to cause a jury to be summoned and compensation assessed for lands taken in 1799, and the court said the application came too late. (*s*)

The general application of Writs of Mandamus principally in enforcing the Rights and Duties of persons. (*t*)

As respects the *Rights* to *Offices* of a public nature, and the *Duties* of certain officers and personages, standing in certain situations, the possession of the *right* on the one hand, and the observance of the *duty* on the other, will be enforced by this writ of Mandamus, and as the instances are numerous,

(*m*) *Rex* v. *Severn and Wye Railway Company*, 2 Barn. & Ald. 646, where Abbott C. J. said, "If an indictment had been a remedy *equally* convenient, beneficial, and as effectual as a mandamus, I should have been of opinion that we ought not to grant a mandamus; but I think it is perfectly clear that an indictment is not such a remedy, for a *corporation* cannot be compelled by indictment to reinstate the road. The court may indeed, in case of conviction, impose a fine, and that fine may be levied by distress, but the corporation may submit to the payment of the fine, and refuse to reinstate the road; and at all events a considerable delay may take place. The remedy, therefore, is not so effectual as that by *mandamus*." And see also *Rex* v. *Commissioners of Dean Inclosure*, 2 Maule & S. 80, 81; Cases of Mag. 88.

(*n*) *Rex* v. *Corporation of Plymouth*, and case there cited; and see *Weale* v. *West Middlesex Water Works*, 1 Jac. & W. 358, 370, 373; as to the refusal of *specific performance*, *post*.

(*o*) *Per* Lord Ellenborough, C. J. in *Rex* v. *Archb. of Canterbury*, 8 East, 219.

(*p*) *Per* Ashurst J. in *Rex* v. *Commissioners of Excise*, 2 Term Rep. 385.

(*q*) Selwyn, Ni. P. 6th ed. 1062.

(*r*) *The King* v. *The Stainforth and Keadley Canal Company*, 1 M. & S. 32.

(*s*) *Rex* v. *Commissioners of Cockermouth Inclosure Act*, 1 Bar. & Adoph. 378, 380.

(*t*) See in general Com. Dig. Mandamus; 2 Rol. Ab. Restitution; Selwyn, N. P. 6 ed. 1062; Impey's Mandamus.

CHAP. X. MANDAMUS.

it is expedient to enumerate, in the following alphabetical table, some of the principal instances when the Court of King's Bench will grant or refuse a mandamus.

Alphabetical list of instances in which a Mandamus will or will not be issued

Accounts, enforcing delivery of, &c. (See *Churchwardens* and *Overseers, post*, 806.)

Administration and Probate. (See *Probate, post*, 806.)

Admission and Admittance. (See *Copyhold post*, 794, and *Officer, post*, 798.)

Alehouses. (See *Licenses, post*, 798.)

Appeal. (See *Justices, Overseers, Rates*, and *Sessions, post*, 804.)

Apprentices.—The writ lies to Mayor of a Corporation to admit an apprentice to his freedom when he has a right by *service*, although he had broken his covenant not to marry; (*u*) so the writ lies to inrol indentures in proper cases, but not otherwise. (*v*) But when the binding or service of a notary's clerk has been insufficient, a mandamus to the scriviners' company to admit him to practise as a notary was refused. (*x*) And a mandamus requiring the admission of an attorney to practise in an inferior court should be to *examine*, and if fit to admit, and not absolutely to admit. (*y*)

Arbritration and Award.—These, when under a public act, may be enforced by mandamus, but otherwise not. (*z*)

Books and Documents. (See *Overseers, post*, 801.)—The writ issues to compel a removed clerk to deliver up books of a public corporate company; (*a*) and to compel overseers to deliver up parish books to their successors, (*b*) but it was refused to new churchwardens against the old, on the ground that the right might be tried by an issue at law; (*c*) and in the case of a vestry clerk, he might maintain trover; (*d*) nor will it lie to compel an attorney and steward to deliver up documents. (*e*) Though, at the instance of the lord of the manor, or of the judge of a court, a mandamus might issue to compel the steward or officer to deliver up the court roll, records, and proceeding, because the immediate production of them might be essential to the public. (*f*) (See further, *Inspection, post*, 810, 811.)

(*u*) *Townsend's case*, 1 Lev. 91; Sir T. Raym. 69, S. C.

(*v*) *Rex* v. *Marshall*, 2 T. R. 2.

(*x*) *Rex* v. *Scriveners' Company*, 10 B. & C. 511.

(*y*) *Rex* v. *York*, 3 B. & Adolp. 790.

(*z*) *Over Kelld Inclosure Act*, and *Rex* v. *Washbrooke*, 7 Dowl. & R. 221; Tidd, 9 ed. 844, *post*, 796, n. (*y*), 805.

(*a*) *Rex* v. *Wildman*, 2 Stra. 879.

(*b*) *Rex* v. *Clapham*, 1 Wils. 305, *post*.

(*c*) *Rex* v. *Street*, Mod. Cas. 98; and see *Anon.* 2 Chit. R. 255.

(*d*) *Anon.* 2 Chit. R. 255, *post*, 810, (*a*).

(*e*) *Cocks* v. *Harmer*, 6 East, 404.

(*f*) *Rex* v. *Ingram*, 1 Bla. R. 30; *Hughes* v. *Mayre*, 3 T. R. 275; *Corpus Christi College*, 6 Taunt. 105, S. C.; *Rex* v. *Erle*, 2 Burr. 1197; and see *Rex* v. *Hulston*, 1 Stra. 621; *Marshall's Case*, 2 Bla. 912; *Ex parte Grubb*, 5 Taunt. 206; Tidd, 9th ed. 87.

Burial will be enforced by mandamus, but not burial in a particular place or manner. (g)

Case, Special.—The statement of this may be compelled by mandamus, when the sessions agreed that there should be a case, unless it should appear that there would be no utility in stating it. (h) But unless the sessions have agreed to state a case, they are not bound to grant it. (i)

Church and Church Rates.—In general, no writ lies to compel the making of a rate, because such a rate is of ecclesiastical jurisdiction. But a mandamus may issue under the 10th Anne, c. 11, sect. 21, to assemble a meeting, and to inquire and agree whether it is fit to make a rate. (k)

Churchwardens. (See *Officers, post*, 798.)—The writ lies to *swear* in a churchwarden, (l) and this, although the ministerial officer has been inhibited by the bishop. (m) And though in one case a mandamus to the churchwardens of St. Botolph, Bishopsgate, commanding them to call a vestry meeting in Easter week to *elect new churchwardens* was refused, as there was no instance of such a mandamus, and the court could not take notice who had the right to call the vestry, and consequently could not know to whom it should be directed. (n) But in a subsequent case the court granted a mandamus to the *inhabitants* of a parish liable to contribute to the church rate, to meet and assemble together, with the minister, to elect churchwardens,(o) and a churchwarden may by mandamus be compelled, upon showing special reasons, to produce his accounts to a party, in pursuance of 17 Geo. 2, c. 38. (p)

Constable.—The writ may be issued to compel the hearing an appeal against a *constable*'s account, under 18 Geo. 3, c. 25, s. 5, but only when a majority of the overseers concurred in the appeal. (q)

Conviction.—A mandamus will be issued to compel justices to set out the evidence in their Conviction, as directed by 3

(g) *Post*, 806.

(h) *Rex* v. *Pembrokeshire*, 2 Bar. & Adolp. 391; *Rex* v. *Effingham*, id. 393, note (a); and see Burn's J., Poor, 786 to 789, 829.

(i) *Rex* v. *Darley Abbey*, 14 East, 285; Burn's J., Poor, 786.

(k) *Rex* v. *St. Margaret's, Westminster*, 4 Maule & Sel. 250, and *post*, 800, n. (h), 804, n. (x).

(l) *Post.*

(m) *Rex* v. *Simpson*, Selwyn, N. P. Mandamus, 1062, note 1; *Anon.* 1 Ventr. 115.

(n) *Anon.* 1 Stra. 686; but see *Rex* v. *Wix*, 2 B. and Adolp. 196; and see next case, that new churchwardens and overseers may by mandamus be compelled to summon a meeting of inhabitants for establishing a select vestry; *Rex* v. *London* 2 B. & Adolp. 506.

(o) *Rex* v. *Wix*, 2 B. & Adolp. 197; *post*, 804.

(p) *Rex* v. *Clear*, 4 B. & Cres. 899; 7 D. & R. 393, S. C.; when not, *Rex* v. *Smallpiece*, 2 Chit. Rep. 288.

(q) *Rex* v. *Manchester*, 1 Dowl. & R. 454.

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Geo. 4, c. 23, s. 1, when that act applies. (*r*) But not to enforce a conviction doubtful in validity. (*s*)

Copyhold.—This writ lies to the lord and steward of a manor, to compel an admission to copyhold. Thus, if the lord of a manor refuse to admit a purchaser, or a devisee, or even an *heir* to copyhold, a mandamus may be issued to compel him, (*t*) though the lord's remedy to compel admittance and payment of the fine would be by proceedings for a forfeiture, *quousque* the fine paid.(*u*) A bill in equity also may be filed to compel a lord to hold courts and admit, and that appears to have been originally the only proceeding, but ultimately courts of law assumed jurisdiction, and now almost exclusively exercise it. (*x*) But no action at law can be supported against the lord for refusing to admit, (*y*) though probably, when the lord of a manor has perversely refused admittance after proper formal request, the court, under the recent act, would subject him to pay the costs of the application. (*z*)

Corporation. (See *Officers, post,* 798.)—The writ issues to compel the filling up of *vacancies* in a corporation consisting of a definite number, and which by deaths of burgesses might otherwise become extinct, and which is a proceeding expedient more frequently to be adopted; (*a*) so to fill up vacancies or compel serving corporate offices; (*b*) and this, although the party has paid a fine, the payment of which does not exempt, (*c*) and it lies to compel the proceeding to a new election, when the former was clearly colourable and void. (*d*) But the Court of King's Bench will not issue a mandamus to compel a mayor to put a resolution to repeal certain bye-laws, there being no precedent for issuing a writ in such a case. (*e*)

Courts.—When it is a duty to hold a court for the benefit of suitors, it may be enforced by mandamus, (*f*) and this even as to the place of holding; (*g*) and the writ may be issued

(*r*) *In the matter of Rix,* 4 Dowl. & R. 352; *Rex* v. *Marsh,* Id. 260; and see "*Justices,*" and *Rex* v. *Warnford,* 5 Id. 489.

(*s*) *Rex* v. *Brodrip,* 5 B. & Cres. 239; 7 D. & R. 861; *Rex* v. *Robinson,* 2 Smith, 274; *Rex* v. *Buckinghamshire,* 1 Bar. & Cres. 485; 2 D. & R. 689.

(*t*) *Rex* v. *Rennett,* 2 T. R. 197; *Rex* v. *Brewers' Company,* 3 B. & Cres. 172; 4 D. & R. 492, S. C.; *ante,* 351; and see *infra,* note (*h*).

(*u*) *Ante,* 351.

(*x*) 1 Mad. Ch. Pr. 253, 254; *Moor* v. *Huntingdon,* Nels. 12; Co. Copyl. sect. 39.

(*y*) *King* v. *Coggan,* 6 East, 431; 1 Mad. Ch. Pr. 254.

(*z*) 1 Wm. 4, c. 21, sect. 8.

(*a*) *Rex* v *Norwich,* 1 Bar. & Adolp. 310; and *Rex* v. *Grampound,* 6 T. R. 301; Case *Town of Nottingham,* 2 Selwyn, N. P. 1072.

(*b*) *Rex* v. *Leland,* 3 M. & S. 184.

(*c*) *Rex* v. *Bower,* 1 B. & Cres. 585; 2 Dowl. & R. 842, S. C.

(*d*) *Rex* v. *Cambridge,* 4 Burr. 2008; *Rex* v. *Bedford,* 1 East, 79.

(*e*) *Rex* v. *Newcastle,* 3 B. & Adolp. 252.

(*f*) *Rex* v. *Hastings,* 5 Bar. & Ald. 692; 1 D. & R. 148; *Rex* v. *Havering,* 2 D. & R. 176, n; 5 B. & C. 691.

(*g*) *Rex* v. *Ilchester,* 2 D. & R. 727; *Rex* v. *Grantham,* 1 Wils. 716; and see *post,* 795, tit. Inferior Courts, &c.

to compel the holding of a copyhold court, to aceept a surrender.(*h*)

Costs (and see *Overseers. Rate.*)—Unless the power to award costs be clear the court will refuse a writ of mandamus to levy a rate for the costs incurred in defending actions for damages done by riotous assemblies under the 57 Geo. 3, c. 19, s. 38.(*i*)

Court Rolls. (See *Inspection, post,* 810, 811.)

Dissenters.—A mandamus lies to justices to register and certify a dissenting meeting-house,(*k*) and to admit a party to take the oaths in order to become a teacher of a dissenting congregation.(*l*)

Distress. (See *Inferior Courts,* &c.)—A mandamus lies to compel the backing of a distress warrant into another county under 35 Geo. 3, c. 101, s. 2,(*m*) but not to issue a distress warrant if the legality of the conviction be doubtful.(*n*)

Evidence.—A mandamus may be issued at the instance of the plaintiff or defendant to examine witnesses in India under 13 Geo. 3, c. 63, s. 44.(*o*) But not to compel a magistrate to produce depositions to an intended prosecutor for perjury, but the magistrate must be subpœnaed.(*p*)

Highways. (See *Surveyor, post,* 804.)

Inferior Courts and Judges thereof, and Justices of Peace, and other Ministerial Officers, to proceed according to their respective duties.—Thus this writ issues to compel justices to give judgment on an information of seizure; (*q*) to hear an application of journeymen millers to make a rate, or the hearing of any other matter which they are required by statute to hear, although upon the hearing they might decide as they think fit.(*r*) So to hear a complaint respecting non-payment of a church-rate, though they might determine as they think proper.(*s*) So if the sheriff or his deputy neglect to enter a plaint in replevin, in the county court, for damage feasant, the Court of King's Bench would compel him by mandamus, though not by a summary motion.(*t*) So where a statute directs, that justices of the peace shall make compensation to

(*h*) *Rex* v. *Boughey,* 1 Bar. & Cres. 565.

(*i*) *Rex* v. *Lynn,* 3 B. & Cres. 147; 4 D. & R. 778, S. C. See the present act 7 & 8 Geo. 4, c. 31, which now provides modes of reimbursement.

(*k*) *Rex* v. *Derby,* 4 Burr. 1991.

(*l*) *Peake's case,* 6 Mod. 310; 2 Salk. 572, S. C.

(*m*) *Rex* v. *Kynaston,* 1 East, 117.

(*n*) *Rex* v. *Robinson,* 2 Smith's R. 274; *ante,* 794, note (*s*).

(*o*) *Grillard* v. *Hague,* 1 Brod. & B. 319; 4 Moore, 313, S. C.

(*p*) *Ex parte Bedford,* 1 Chit. R. 227; but see *Rex* v. *Smith,* 1 Stra. 126; *Welsh* v. *Richards,* Barnes, 468.

(*q*) *Rex* v. *Tod,* 1 Stra. 530.

(*r*) *Rex* v. *Kent,* 14 East, 395; *Rex* v. *Cumberland,* 1 M. & S. 190.

(*s*) *Rex* v. *Wrottesley,* 1 B. & Adolp. 648.

(*t*) *Ex parte Boyle,* 2 Dowl. & Ryl. 13.

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the sheriff in lieu of abolished gaol fees, the making such compensation will be enforced by mandamus.(u) So to commissioners of bankrupts, to issue their warrant for further examination.(x) So to arbitrators under a canal act to appoint an umpire as therein enjoined.(y) To a visitor to hear an appeal and give some judgment.(z) So to compel an inferior court to give judgment,(a) but not to grant a new trial unless the former were a nullity.(b) To a canal company in a local act to assess the value of land taken by them, pursuant to provisions, and make recompense, provided the application be made within a reasonable time, but otherwise not.(c) So a mandamus to justices may be issued to compel them to allow the expenses sustained by an appellant parish in keeping a poor person from the time of his removal till the order of removal was discharged,(d) and the writ also lies to compel the warden of a college to affix the corporate seal to an answer in chancery.(e)

Negative.—But the writ will not be granted unless the act required to be done be clearly within the act or duty to be performed,(f) nor to perform an act which might render the justices liable to an action, the issue of which would be doubtful, though it would be otherwise if there were no probability of such liability.(g) Nor will it lie to dismiss an appeal,(h) nor to re-hear an appeal against an order of removal after judgment given at sessions, though it might be otherwise if no judgment had been given.(i) Nor will it issue to compel justices to come to any particular prescribed decision.(k) But if the sessions should erroneously decide that they have no jurisdiction when they had, and on that account dismissed the appeal, then a mandamus lies.(k) Nor will the writ issue to compel the re-hearing of an appeal unless where the evidence on hearing one side had been *totally* rejected, for that would be in effect the same as if the appeal had not been heard at all;(l) nor will

(u) *Rex* v. *Middlesex*, 3 B. & Adolp. 100.
(x) *In re Bromley*, 3 Dowl. & R. 310, and *post*, 805, 806.
(y) *Rex* v. *Goodrich*, 3 Smith's R. 388.
(z) *Rex* v. *Ely*, 5 T. R. 475; *Rex* v. *Lincoln*, 2 Id. 338; *Rex* v. *Bury*. Id. 346; *Rex* v. *Worcester*, 4 Maule & S. 415; *when not*, *Rex* v. *Conynham*, 5 B. & Ald. 885; 1 Dowl. & R. 529.
(a) *Brook* v. *Ewers*, 1 Stra. 113; *Ex parte Amherst*, T. Raym, 214; *Ex parte Morgan*, 2 Chit. R. 250.
(b) *Ex parte Morgan*, 2 Chit. R. 250.
(c) *Rex* v. *Stanford*, 1 Maule & Sel. 32.
(d) *St. Mary's, Nottingham*, v. *Kirklington*, 2 Sess. Cas. 67.
(e) *Rex* v. *Windham*, Cowp. 377; *Rex* v. *Cambridge*, 3 Burr. 1647.
(f) *Rex* v. *Hayward*, 1 M. & S. 624.
(g) *Rex* v. *Buckinghamshire*, 1 Bar. & Cres. 485; 2 Dowl. & R. 809, S. C.; *Rex* v. *Robinson*, 2 Smith, 274; *Rex* v. *Brodcrip*, 5 B. & C. 239; 7 D. & R. 861, S. C.
(h) *Rex* v. *Wilts*, 2 Chit. R. 257.
(i) *Rex* v. *Leicestershire*, 1 M. & S. 444; *Rex* v. *Carnarvon*, 4 B. & Ald. 86.
(k) *Rex* v. *Middlesex*, 4 B. & Ald. 298; *Rex* v. *Worcestershire*, 1 Chit. R. 649.
(l) *Rex* v. *Carnarvon*, 4 B. & Ald. 86, 88; *Rex* v. *Middlesex*, Id. 298; *Rex* v. *Gloucestershire*, 1 B. & Adolp. 1, 5.

it lie to review a decison on the ground that they had come to a wrong decision;(*m*) nor if a party have omitted to give *any* notice of appeal against a conviction, and on that account his appeal has been dismissed;(*n*) nor if a petition has been heard and considered although witnesses tendered were not examined;(*o*) nor to compel justices to proceed upon an order of removal which they had previously by order superseded;(*p*) nor to compel justices to proceed where they could not legally do so on account of a defect in their proceedings;(*q*) nor to regulate the practice of the quarter sessions unless it appear to be manifestly wrong or unjust;(*r*) nor to compel a bishop to state his reasons for refusing to admit a party as deputy register of a diocese;(*s*) nor to compel the mayor of a town corporate to propose a resolution for repealing certain by-laws, and which he had refused to put.(*t*)

Not when the Power was Discretionary.—When justices have discretionary power the Court of King's Bench will not interfere, as in granting *Alehouse Licenses*,(*u*) and the same rule applies to other persons;(*x*) nor to compel justices to allow an item in a coroner's account;(*y*) nor even to compel a justice or judge to come to a particular decision;(*z*) nor to make an order of maintenance on a particular parish;(*z*) nor to compel sessions to hear an appeal when out of time and where they in their discretion refused a postponement;(*a*) nor to compel sessions to give reasons for their judgments or make any special entries upon their records;(*b*) nor in general to justices to assign their reasons for their decision.(*c*) And though when the sessions upon delivering an appeal on a settlement case have granted a case and none has been stated, the court will under some circumstances direct a mandamus to the justices who heard the appeal to state a case,(*d*) they will not do so where it is clear that such a proceeding could lead to no result; as where the chairman, in consequence of his own opinion and that of the court upon the facts differing, refused to sign any

(*m*) *Rex* v. *Worcestershire*, 1 Chit. R. 649; *Rex* v. *Justice*, 1 Chit. R. 164.

(*n*) *Rex* v. *Oxfordshire*, 1 M. & S. 446.

(*o*) *Rex* v. *Cumberland*, 1 M. & S. 190; *Rex* v. *Kent*, 14 East, 395.

(*p*) *Rex* v. *Norfolk*, 1 Dowl. & R. 69.

(*q*) *Rex* v. *Lincolnshire*, 3 Bar. & Cres. 549.

(*r*) *Rex* v. *Essex*, 2 Chit. R. 385.

(*s*) *Rex* v. *Gloucester*, 2 B. & Adolp. 158; *Rex* v. *London*, 13 East, 419; *Rex* v. *Deven*, 1 Chit. R. 34; *Rex* v. *London*, 3 B. & Adolp. 255.

(*t*) *Rex* v. *Newcastle*, 3 B. & Adolp. 252.

(*u*) *Giles's case*, 2 Stra. 881.

(*x*) *Rex* v. *Chester*, 1 M. & S. 101; *Rex* v. *Flockwold*, 2 Chit. R. 251; *Rex* v. *Gloucester*, 2 B. & Adolp. 163, *per* Parke, J.; *post*, 800, n. (*b*).

(*y*) *Rex* v. *Kent*, 11 East, 229.

(*z*) *Rex* v. *Middlesex*, 4 B. & Ald. 298.

(*a*) *Ex parte Becke*, 3 B. & Adolp. 704.

(*b*) *Rex* v. *Devon*, 1 Chit. R. 34; *Rex* v. *London*, 3 B. & Adolp. 255.

(*c*) *South Cadbury* v. *Braddow*, 2 Salk. 607; *Rex* v. *Devon*, 1 Chit. R. 34.

(*d*) *Rex* v. *Pembrokeshire*, 2 B. & Adolp. 391; *Rex* v. *Effingham*, Id. 393, in notes, where see a suggestion how the justices are to proceed in stating the case.

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statement but one which would have excluded the point of law relied upon by the party demanding the case.(*e*)

Inspection of Court Rolls, &c. (See *post*, 810, 811; and see *Books, ante*, 792.)

License.—No mandamus will be issued relating to the granting a license, as to re-hear an application for an alehouse license which justices had refused, although it was suggested that their refusal proceeded from a mistaken view of their jurisdiction. (*f*)

Manor. (See *Copyhold*(*g*) and *Inspection, post*, 810, 811.)

Oaths. (And see *Officers and Overseers.*)—A mandamus lies to justices to admit a person to take the oath, &c. in order to be teacher of a dissenting congregation. (*h*)

Officers and Situations of a Public Nature.—Whenever the office, whether temporal or ecclesiastical or otherwise, is *legal* and *public*, or *fixed and permanent* by statute, charter or usage, then this writ lies to swear in, admit or restore a party entitled to the same; but if the office or station be merely of a *private nature* or determinable *at will*, then no mandamus will be granted, (*i*) unless there be another remedy, as in the case of ecclesiastical persons by *quare impedit*, (*k*) or by *quo warranto*, when there is a recorder *de facto* though not *de jure*.(*l*) Nor will a mandamus be issued to swear in or admit, unless the party can show that he *in all respects* is *entitled* to practise or hold the office; (*m*) and a mandamus to the judges of an inferior court to admit an attorney, ought not to be directly to admit, but only to examine whether he be capable and qualified to be admitted. (*n*)

Corporate Officers.—A writ of mandamus lies to admit or restore one of these from the highest to the lowest, whenever legally elected or appointed, and not legally removed, (*o*) as a mayor, alderman, jurat of a corporation, common councilman, recorder, (*p*) town-clerk, (*q*) liveryman, burgess, bailiff, serjeant or high steward, (*r*) and any peace officer thereof; (*s*)

(*e*) *Rex* v. *Pembrokeshire*, 2 B. & Adolp. 391.

(*f*) *Rex* v. *Farringdon*, 4 Dowl. & R. 735; *Giles's case*, Stra. 881; *Rex* v. *Nottingham*, Say. Rep. 217; *Rex* v. *Storrey*, 5 Dowl. & R. 308.

(*g*) *Ante*, 794.

(*h*) *Peake's case*, 6 Mod. 310; *Rex* v. *Peach*, 2 Salk. 572.

(*i*) *Rex* v. *London*, 2 T. R. 182, what offices are deemed *public*, see Burn's J. tit. "Poor;" *Rex* v. *Croydon*, 5 T. R. 713; *Rex* v. *Bishop of London*, in the case of lecturer of St. Ann's, Westminster, 2 Stra. 1192; 1 Wils. 11, S. C.

(*k*) *Rex* v. *Chester*, 1 T. R. 396.

(*l*) *Rex* v. *Colchester*, 2 T. R. 259.

(*m*) *Rex* v. *Scriveners' Company*, 10 Bar. & Cres. 511.

(*n*) *Rex* v. *York*, 3 B. & Adolp. 770.

(*o*) *Rex* v. *Axbridge*, Cowp. 523. As to writs of mandamus relative to corporations, see Selwyn's Ni. Pri. tit. "Mandamus."

(*p*) *Rex* v. *Wells*, 4 Burr, 1999; when not, *Rex* v. *Colchester*, 2 T. R. 259.

(*q*) *Awdeley* v. *Joye*, Poph. 176.

(*r*) See cases and instances, Impey's Mandamus, 42, 43.

(*s*) *Semble*, *Awdeley* v. *Joye*, Poph. 176.

and if either of these have the right, though he has never had possession of the office, his admission will be enforced. (r) But if the election be discretionary, no mandamus to proceed to elect would be issued; (s) nor to elect members of an undefined body; (t) nor to compel a corporate assembly for the purpose of removing non-resident members. (u) And if upon the affidavits it should be doubtful whether the office be public or private, the court will issue a mandamus in order to have the facts fully stated in the return.

In general if the office is acquirable by *purchase*, and *an oath* of office, as well as oaths to *government* are administered, it will be presumed to be *public;* and on that ground a mandamus was granted to restore a party to the office of *clerk or surveyor to the city works;* (x) and this writ was issued to restore the treasurer of the New River Company, for though it was but a private corporation yet it was created by the king's letter-patent. (y)

Upon affidavit that one of two candidates for an office had a majority only by means of *illegal* votes, the court will grant a mandamus to the corporation to admit and swear in the other who appeared upon the affidavits to have the greater number of *legal* votes, notwithstanding the first had been admitted and sworn into the office, there being no other specific, or at least no other such convenient mode of trying the right. (z)

Ecclesiastical Officers and Persons.—The admission and restoration of these may be enforced from the highest to the lowest, (a) unless in some cases, as where there is another appropriate remedy, as by *quare impedit,* for interfering with the right of presentation (b) or ejectment when a parson has been evicted; (c) yet mandamus lies in other cases, as to try the right of officiating in a chapel by admitting a person to the curacy; (d) to compel the bishop to grant a license to a lecturer to preach, or to show good cause to the contrary; (e) to the trustees of a meeting-house to admit a dissenting teacher duly elected; (f) to restore to the ministry of an endowed

(r) *Rex* v. *St. John's College,* 4 Mod. 368; Sty. 299.
(s) *Rex* v. *Chester,* 1 M. & S. 102; *Foot* v. *Brown,* 1 Stra. 625.
(t) *Rex* v. *Fowey,* 4 Dowl. & R. 132.
(u) *Rex* v. *Portsmouth,* 3 B. & Cres. 152; 4 D. & R. 767, S. C.
(x) *Rex* v. *London,* 2 T. R. 182, n. 6.
(y) Id.; *Anon.* 1 Stra. 696, S. P.; *Rex* v. *London,* 1 Lev. 123; Sid. 169; 3 Mod. 334, S. C.; but see the last report, which shows it was rather experimental.
(z) *Rex* v. *Bedford Level,* 6 East, 536; and see *Rex* v. *York,* 4 T. R. 699.
(a) See in general Selwyn's N. P. tit. Mandamus, II.; Harrison's Index, Mandamus, 6.
(b) *Rex* v. *Chester,* 1 T. R. 396.
(c) *Ante;* but see *Clark* v. *Sarum,* 2 Stra. 1082.
(d) *Rex* v. *Bloer,* 2 Burr. 1043.
(e) *Rex* v. *London,* 13 East, 420; 1 T. R. 331; *Rex* v. *Field,* 4 T. R. 125.
(f) *Rex* v. *Barker,* 3 Burr. 1265; 1 Bla. R. 300, 352, S. C.

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dissenting meeting house; (g) to swear in or restore a churchwarden, (h) a parish clerk, (i) or a sexton; (k) but not to restore the minister of an endowed dissenting meeting-house when expelled by the majority of congregation, if it do not appear that he has complied with all the requisites essential to give him a *primâ facie* title. (l)

Other Officers and Stations.—So a candidate as clerk to the Commissioners of the Land Tax may by mandamus compel them to proceed to elect a clerk, (m) and if elected may have a mandamus to swear him in and admit him; (n) and a mandamus will lie to the warden of a college to admit a chaplain, especially if there be no other visitorial power; (o) to restore a schoolmaster of a grammar school by the crown; (p) to restore the master of a college; (q) and even to restore an usher of a grammar school. (r) And if the visitor of a college in one of the universities should refuse to exercise his visitorial power by receiving and hearing an appeal, the Court of King's Bench will grant a mandamus to compel him. (s)

If in any case of election it be uncertain which of two candidates was duly elected, then, upon hearing the discussion of the rule nisi, the court will, instead of a mandamus to swear in or admit, issue a mandamus to proceed to a *new election*. (t) So it lies to restore a party to the office of master of a free school. (u)

When not.—But when the office is *private*, (x) or determinable *at pleasure*, (y) no writ will be issued; nor will it be to restore, if the party were confessedly rightfully removed as regarded the merits, although irregularly so without adequate notice; (z) nor where the suspension from the office was not equivalent to a removal. (a) Nor where the words "shall and may" are not obligatory but *discretionary*; (b) nor to compel the

(g) *Rex* v. *Jotham*, 3 T. R. 575.

(h) *Anon.* 2 Chit. R. 254; *Rex* v. *Harris*, 3 Burr. 1420; *ante*, 793.

(i) Id. ibid.; *Rex* v. *Warren*, Cowp. 370.

(k) *Rex* v. *St. James's*, Cowp. 413; *Rex.* v. *King's Clerc*, 2 Lev. 18; *Ile's Case*, 1 Vent. 143; Selw. N. P. Mandamus, 1k. n. (s).

(l) *Rex* v. *Canterbury*, 8 East, 215; see other cases as to clerical persons, Impey, Mandamus, 103 to 106.

(m) *Rex* v. *Commissioners of Westminster*, 1 T. R. 146.

(n) *Rex* v. *Thatcher*, 1 Dowl. & R. 426.

(o) *Rex* v. *Chester*, 2 Stra. 797; *Appleyard's Case*, 1 Mod. 82; and see *Clark* v. *Bishop of Sarum*, 2 Stra. 1082; but see *ante*, 799.

(p) *Rex* v. *Morpetts*, 1 Stra. 58.

(q) *Patrick's Case*, T. Raym. 111.

(r) *Craford's Case*, Sty. 457; *Stamp's Case*, T. Raym. 12.

(s) *Rex* v. *Ely*, 5 T. R. 475; *Phillips* v. *Bury*, 2 T. R. 346.

(t) *Rex* v. *Hertfordshire*, in the matter of *Jordan*, Easter Term, A. D. 1833.

(u) *Anon.* Lofft, 146.

(x) *Ante*, 790; *Anon.* 2 Ld. Raym. 989, S. P.

(y) *Ante*, 798, note (i).

(z) *Rex* v. *Axbridge*, Cowp. 523; *Rex* v. *London*, 2 T. R. 177.

(a) *Rex* v. *Whitslake*, 7 East, 353.

(b) *Rex* v. *Eye*, 2 Dowl. & R. 172; *Rex* v. *Flockwold Inclosure*, 2 Chit. R. 251; *Rex* v. *Chester*, 1 M. & S. 101; or another remedy, as by Quo Warranto, *Rex* v. *Colchester*, 2 T. R. 259.

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Archbishop of Canterbury to issue his fiat for the admission of a doctor of laws as advocate of the Court of Arches; (c) nor to the benchers of one of the inns of court to admit a person as a member or student, nor to call him to the bar so as to enable him to practise as a barrister; (d) nor to the College of Physicians to examine a party so that he may be admitted a fellow of the college; (e) nor to admit an attorney, that being discretionary in the judge who examines him, and the only remedy is petition to the court. (f)

Orders.—These will not in general be enforced by mandamus, but the disobedience of them may be punished by indictment. (g)

Overseers of the Poor.—A mandamus lies to justices of the peace to nominate overseers, although the time mentioned in the statute 43 Eliz. c. 2, s. 1, has expired, the statute being only directory as to time; (h) so to appoint overseers in an extra-parochial place, (i) or a separate hamlet; (k) to appoint overseers when the present had been appointed on a Sunday; (l) to preceding overseers to deliver over the parish books to their successor; (m) or to the overseers to make a rate, (n) the rule for which is absolute in the first instance, for otherwise the poor might starve. (n) So it lies to overseers and guardians to pass their accounts; (o) to justices to swear an overseer to his accounts; (p) or to proceed to pass overseers' accounts; (q) or to levy the balance of the overseers' accounts; (r) or to hear a complaint against overseers for not delivering a full account; (s) or to hear an appeal against his account, although not previously allowed at a special sessions; (t) or a complaint against him for not paying over the balance. (u)

(c) *Rex* v. *Exeter*, 2 East, 462.

(d) *Rex* v. *Gray's Inn*, Dougl. 353; *Wooller's Case*, 4 B. & C. 855; the only mode of relief is by appeal to all the judges. In case of D. W. Harvey there was such an appeal, but it was unsuccessful; and see *Rex* v. *Gray's Inn*, 1 Dougl. 353.

(e) *Rex* v. *College of Physicians*, 7 T. R. 282.

(f) 2 Geo. 2, c. 23, s. 2 to 6; 23 Geo. 2, c. 26, s. 15.

(g) *Rex* v. *Bristow*, 6 T. R. 168; but see *Rex* v. *Shaw*, 5 T. R. 549; and see Inferior Courts, Justices, &c., *ante*, 795 to 798.

(h) *Rex* v. *Sparrow*, 2 Stra. 1123; Burn's J. Poor, 24, 25; *Rex* v. *Norwich*, 1 Bar. & Adolp. 313; what must be sworn, *Rex* v. *Bedfordshire*, Cald. 157; and *Rex* v. *Peterborough*, Id. 238.

(i) *Rex* v. *Stafford*, 1 Stra. 512.

(k) *Rex* v. *Wiltshire*, 1 Wils. 138; *Rex* v. *Horton*, 1 Term R. 374.

(l) *Rex* v. *Bridgewater*, Cowp. 189; *Anon.* Lofft, 618.

(m) *Rex* v. *Clapham*, 1 Wils. 305; *Rex* v. *Bleshow*, 1 Bott. 260.

(n) *Luddleston* v. *Exeter*, Fol. 18; *Rex* v. *Edwards*, 1 Bla. Rep. 637; *Rex* v. *Fisher*, Sayer's R. 160.

(o) *Rex* v. *Warwickshire*, 2 Dowl. & Ry. 299.

(p) *Rex* v. *Middlesex*, 1 Wils. 125.

(q) *Rex* v. *Townsend*, 1 Bott, 305.

(r) *Rex* v. *Somersetshire*, 2 Stra. 992; 2 Sess. Cas. 283; *Rex* v. *Pascoe*, 2 M. & S. 343.

(s) *Rex* v. *Worcestershire*, 3 Dowl. & Ry. 299; 2 Mag. Cas. 7, S. C.

(t) *Rex* v. *Colchester*, 5 Bar. & Ald. 535; 1 Dowl. & Ry. 146, S. C.

(u) *Rex* v. *Pascoe*, 2 Maule & S. 343; *Rex* v. *Manchester*, 1 Dowl. & Ry. 454, *Rex* v. *Worcestershire*, 3 Dowl. & Ry. 299; 2 Cas. Mag. 7, S. C.

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Payment of a public debt or duty may in some cases be enforced by mandamus to the party who ought to pay; as to pay an assessment towards a *poor rate* when there is doubt whether the property apparently liable to be taken as a distress belongs to the party rated. (*x*) So if a ministerial legal officer be duly ordered to pay over money, it should seem that the payment might in particular cases be enforced by mandamus, as upon an order of guardians of the poor upon their treasurer to pay over, but not if the order were made only by the justices at sessions, who had no jurisdiction. (*y*) In general the modes of enforcing payment of a public duty is by distress; or if duly ordered to be paid, then by indictment for disobedience of the order; (*z*) as by an indictment of the treasurer of the county for refusing to pay a constable the expenses of apprehending and conveying to prison a deserter. (*a*) So a mandamus to the treasurer and directors of the St. Katherine Dock Company is the proper remedy to enforce the payment of the costs of an action against the treasurer of the company under the statute 6 Geo. 4, c. 5. (*b*)

Permit.—When it is the duty of an officer of the excise to grant, and he should refuse, a permit to remove wine, the court would compel the delivery of a proper permit. (*c*)

Poor rate.—The 43 Eliz. c. 2, is imperative on the churchwardens and overseers to make a rate, and the performance of that duty will, upon affidavit of the necessity and neglect, be enforced by *mandamus* to the churchwardens and overseers to make, and the justices to sign, a rate; (*d*) and such a mandamus will be granted in the *first instance* without a rule nisi, for otherwise in the mean time the poor might starve. (*e*) So it lies to justices to make a rate *in aid*, after inquiring whether it be necessary, though not so if the other parish be within an exclusive jurisdiction. (*f*) And it has been supposed that a mandamus would issue to make a rate assessing stock in trade

(*x*) *Rex* v. *Margate*, 3 Bar. & Ald. 220; 2 Chitty's Rep. 256, S. C.

(*y*) *Rex* v. *Shaw*, 5 Term Rep. 549; but see in Impey, Mand. 109.

(*z*) *Rex* v. *Rye*, 2 Burr. 799; *Rex* v. *Mythom*, 4 Doug. 333; *Rex* v. *Moorehouse*, Id. 388; *Rex* v. *Harris*, 4 Term Rep. 205; *Rex* v. *Kingston and others*, 8 East, 41.

(*a*) *Rex* v. *Pierce*, 3 M. & S. 62; and see *Rex* v. *Cookson*, 16 East, 376.

(*b*) *Corpe* v. *Glyn*, 3 Bar. & Adolp. 801.

(*c*) *Rex* v. *Commissioners of Excise*, 2 T. R. 381; *Rex* v. *Cookson*, 16 East, 376; *Rex* v. *Commissioners of Liverpool*, 2 Maule & S. 223.

(*d*) *Ledesdon* v. *Exeter*, Fol. 19; *Rex* v. *Woolly*, 2 Stra. 1259; and other cases, Burn's J. Poor, 44. In *Rex* v. *Canterbury*, 1 Bla. R. 667; 4 Burr. 2290, S. C. it was supposed that there must first have been an appeal to the sessions. But an appeal against what?

(*e*) *Rex* v. *Fisher*, Sayer's Rep. 160.

(*f*) *Rex* v. *Holbeach*, 4 Term Rep. 778.

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and personal property. (g) But the practice is otherwise. (h) It lies to justices to *sign* or *allow* a rate, as that act is merely ministerial; (i) and if there be two different rates, the justices will be compelled to elect which to sign. (k) And though a mandamus will not be issued to command the overseers to *collect* the rate, (l) yet it may be issued to compel the party rated, at least when a corporation, to *pay*, as when it is doubtful whether the property apparently to be distrained upon is really the property of the corporation, and the taking of which might lead to an action. (m) So it issues after inexcusable refusal to compel a justice to summon a party, even a bishop, in arrear, and if he show no cause, to issue his distress warrant in a clear case of liability, (n) but not if the liability be doubtful, and the proceeding might subject the justice to an action. (o) And it will not issue to direct that certain persons shall be inserted in the rate; (p) nor to regulate the equality of the assessment. (q)

Probate may be enforced by mandamus. (r)

Public Works.—Where a railway had been made under the authority of a statute, under which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same, the company having afterwards taken up the railway, it was held that a mandamus might issue to compel the company to reinstate and lay it down; (s) but if the public right or duty be doubtful, the court would not interfere, but leave the applicant to try the question by indictment; (t) and though when commissioners of sewers are bound to repair, their liability may be inforced, it would not be so on the application of the owner of marsh lands bound to repair, and whose neglect occasioned an inundation. (u)

Rate. (See *Poor-rate. Overseers.*)—A writ of mandamus will not be issued to justices to make a rate to reimburse two

(g) Impey, Mand. 21, 22, cites *Rex* v. *Canterbury*, 1 Bott, 132; *Rex* v. *Whitney*, Id. 141; *Rex* v. *Barking*, 2 Lord Raym. 1280; *Rex* v. *Ambleside*, 16 East, 380.

(h) See cases in Burn's J. Poor, 63 to 68.

(i) *Rex* v. *Bucker*, 8 Mod. 335.

(k) *Rex* v. *Anon.* Comb. 479.

(l) *Rex* v. *Norwich Overseers*, Nolan's P. L. 28.

(m) *Rex* v. *Margate*, 3 B. & Ald. 220; 2 Chit. R. 250, S. C. The remedy in general for a poor rate is *only* by distress, *ante*, 664, 665.

(n) *St. Luke's* v. *Middleton*, 1 Wils. 173; *Rex* v. *Middlesex*, 2 Kenyon's R. 163; *Rex* v. *Benn*, 6 Term R. 198.

(o) Id. ibid.; *Harmer* v. *Carr*, 7 T. R. 272; *Anon.* 2 Chit. R. 267.

(p) *Rex* v. *Weobly*, 2 Stra. 1259.

(q) *Rex* v. *Barnstable*, Fol. 16; *Butler* v. *Cobbett*, 1 Bott, 265.

(r) *Post*, 806.

(s) *Rex* v. *Severn and Wye Railway Company*, 2 Bar. & Ald. 646, and *ante*.

(t) *Rex* v. *Plymouth Corporation*, *ante*, 794, note (n), and when no remedy in Equity, see *Weale* v. *West Middlesex Waterworks Company*, 1 Jac. & Walk. 358, 370, 373, 374, *post*.

(u) *Rex* v. *Commissioners of Sewers, Essex*, 1 Bar. & Cres. 477; 2 Dowl. & R. 700, S. C.

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inhabitants in defence of indictment for not repairing a bridge; (*u*) nor to make a church-rate, that being matter of ecclesiastical jurisdiction, (*x*) unless in certain cases under modern acts; (*y*) nor a rate to reimburse churchwardens. (*z*)

Register. (See *Ship*.)

Security of Peace.—This writ will be issued to justices to compel them to take security on articles of peace exhibited in the King's Bench, where the party to give them resides at a distance in the country. (*a*) But the court, it is said, will not interfere with the local original jurisdiction of justices in compelling them to take sureties of the peace. (*b*)

Sessions. (See *Inferior Courts*.)—A mandamus lies to justices at sessions to receive and determine an appeal at a *subsequent* sessions, (*c*) or to receive an appeal during the *next* sessions, (*d*) to adjourn an appeal when there has not been reasonable time to hear it at the next sessions, (*e*) and to enter continuances and hear appeal. (*f*) But it will not issue when there was sufficient time to appeal, &c., (*g*) nor where it was in the discretion of the magistrates, (*h*) nor to regulate the practice of sessions, unless manifestly wrong or unjust, (*i*) nor to compel the Court of Sessions to hear particular evidence. (*k*)

Sheriff and his deputy will be compelled to perform his duty, as to enter a plaint in replevin in the County Court for damage feasant. (*l*)

Ship Registry.—The granting of, will be enforced when directed by statute, but not so where there has been an irregularity in a transfer, when the commissioners of customs will not be commanded to grant a license or register. (*m*)

Special Case. (See *Case*, *ante*, 793.)

Surveyor. (See *Highways*.)—A writ of mandamus may be issued to justices to *appoint* a surveyor of highways, (*n*) or *swear him* in, (*o*) or to justices to make a rate to reimburse a surveyor. (*p*)

(*u*) *Anon.* 1 Stra. 63.

(*x*) *Rex* v. *Thetford*, 5 Term R. 364; S. P. in *Rex* v. *Coleridge*, 2 Bar. & Ald. 806; 5 Dowl. & Ry. 602; 1 Chit. Rep. 588, S. C.; *ante*, 723.

(*y*) *Rex* v. *Lambeth*, 3 B. & Adolph. 651; *ante*, 793, (*k*).

(*z*) *Rex* v. *Bradford*, 12 East, 556; *ante*, 793; as to decreeing the payment of money to be levied by a parish rate, see note (*a*) to *Ex parte Fowler*, 1 Jac. & W. 73, 74.

(*a*) *Ante*, 683, note (*d*); *Rex* v. *Lewis*, 2 Stra. 833; 12 Sess. Cas. 68.

(*b*) *Rex* v. *Bushfield*, 2 Sess. Cas. 67.

(*c*) *Rex* v. *Wiltshire*, 1 East, 183; see cases on this subject 2 Harrison's Index, 65; Burn's J. tit. *Appeal*, and tit. *Sessions*.

(*d*) *Rex* v. *Leicester*, 1 East, 186.

(*e*) *Rex* v. *Buckinghamshire*, 3 East, 342; *Rex* v. *Shropshire*, 7 East, 549.

(*f*) *Rex* v. *Wiltshire*, 10 East, 404.

(*g*) *Rex* v. *Wiltshire*, 2 Bott, 717; *Ex parte Beeke*, 3 B. & Adolph. 704.

(*h*) *Ex parte Beck*, 3 B. & Adolph. 701.

(*i*) *Rex* v. *Essex*, 2 Chit. Rep. 385.

(*k*) *Rex* v. *Cambridgeshire*, 1 Dowl. & Ry. 325.

(*l*) *Ex parte Boyle*, 2 Dowl. & R. 13; *ante*, 795, (*t*).

(*m*) *Rex* v. *Custom*, Abbott, Ship. 54; *Rex* v. *Collector Customs, Liverpool*, 2 M. & S. 223.

(*n*) *Rex* v. *Denbighshire*, 4 East, 142.

(*o*) *Rex* v. *Pettiward*, 4 Burr. 2452.

(*p*) *Hassel's case*, 1 Stra. 211.

Warrant. (See *Conviction.* *Distress.*)—A writ of mandamus lies to compel the backing a warrant into another county, the duty being ministerial and imperative. (*q*)

Other cases where the courts will grant or refuse the writ.

Arbitrations under statutes.

Where a reference to *Arbitration* has proceeded under an act of parliament, the court will grant a *mandamus* to the arbitrator under it to appoint an umpire; (*r*) and upon a motion respecting an award of a commissioner under an inclosure act, the Court of King's Bench said, "We may punish upon this if there be any corruption, or enforce its execution by mandamus, though we are not to interpret or set aside these awards upon complaint of their obscurity." (*s*) But it should seem, that unless in cases of arbitrations founded on some *statute*, or where the written submission to arbitration has been made a *rule of court* under the general arbitration act, (*t*) the proceedings would be considered as a mere *private* transaction between the parties, in respect of which no writ of mandamus could *issue;* the Court of King's Bench will not issue that prerogative writ in aid of mere private contracts or transactions.

Absolute rights.

As regards the *Person,* there are also some *other rights* that may be specifically enforced by mandamus; as where the attorney of a party imprisoned upon a capital charge had been refused by the visiting magistrates, in the exercise of their controul over prisons, under the 4 Geo. 4, c. 64, admission to the prison, so as to enable him to prepare his defence, the Court of King's Bench, upon affidavit of the necessity and refusal, issued a mandamus, directing the magistrates to permit the attorney to have access to the prison at proper times to be fixed by them. (*u*) And we have seen that where a bankrupt, even after repeated examinations, had been finally committed by the commissioners for not satisfactorily answering, yet a mandamus was granted conditionally to the commissioners to issue their warrant for a further examination, on a suggestion that the bankrupt was desirous of disclosing his estate and effects; for otherwise the commitment

(*q*) *Rex* v. *Kynaston,* 1 East, 117.

(*r*) *Rex* v. *Goodrich,* 3 Smith's R. 388.

(*s*) *Case on the Over Kellet Inclosure Act,* Hil. 38 Geo. 3, K. B.; and see *Rex.* v. *Inhabitants of Washbrooke,* 7 D. & R. 221; Tidd, 9 ed. 844.

(*t*) 9 & 10 Wm. 3, c. 15.

(*u*) In *Thurtell's case,* Mich. T. 1823, MS., on motion for mandamus to justices of Hertfordshire, who had regulation of Hertford gaol under 4 Geo. 4, c. 64. *Aliter,* before that act, *Rex* v. *Carlisle,* 1 Dowl. & Ryl. 535: but the court will not direct what particular food a prisoner should have *who refused to work, Rex* v. *Yorkshire,* 2 B. & Cres. 286; 3 Dowl. & R. 510, S. C.

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would occasion *perpetual imprisonment*, although the party was at length anxious to submit. (*x*)

Relative duties how specifically enforced.

At *law* we have seen that *maintenance* of a child or wife, and some other relatives, may be specifically enforced under the provisions of the 43 Eliz. c. 2, s. 7, by order of a magistrate against the superior relative, when of sufficient ability; (*y*) and if a parent absent himself in order to avoid the fulfilment of that duty, he is liable also to punishment under the Vagrant Act. (*z*) But when proper maintenance and education are withheld by a parent from a child in the higher ranks of society, the usual course is to seek relief in the Court of Chancery. (*a*)

Mandamus to compel *burial*.

After death a mandamus may be obtained to compel the *burial* of a parishioner, though not to direct the precise place or mode of burial. (*b*)

Mandamus to compel *probate* or *administration*.

So a mandamus lies to compel the ecclesiastical judge to grant *probate* to the executor named in a will, (*c*) or *letters of administration* to the husband of his wife's estate, unless the husband has done something to part with his right; (*d*) and a mandamus for administration to the next of kin may be granted, notwithstanding a suit depending, if his consanguinity be not denied. (*e*) But when the validity of a will has been contested in the Spiritual Court, and a suit is still depending there concerning it, the court will not then grant a mandamus to the judge of such court to grant a probate to any particular person. (*f*) Nor will the court compel the grant of administration *durante minore ætate*, for the law has not decided who is entitled to such administration, and we have seen that a mandamus only issues to enforce a *legal right*. (*g*)

The *preliminary Practice* in obtaining a writ of Mandamus: (*h*)

The *full practice* relating to writs of mandamus will be considered in the next volume, but it is expedient here to give an outline, especially of the steps to be taken before the court has granted a rule nisi for issuing. The preliminary conduct of the party is here particularly important, especially as under the

(*x*) *In re Bromley*, 3 Dowl. & R. 310.

(*y*) *Ante*, 65; Burn's J., Poor; *Rex* v. *Friend*, Russ. & Ry. 22.

(*z*) 5 Geo. 4, c. 83, s. 1; *ante*, 621, in notes.

(*a*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. R. 23; *ante*, 65.

(*b*) *Ante*, 50, 51; *Andrews* v. *Cawthorne*, Willes, 530; *Rex* v. *Coleridge*, 2 Bar. & Ald. 806; 1 Chit. R. 588, S. C; *Ex parte Blackmore*, 1 Bar. & Adolph. 122.

(*c*) *Anon.* 1 Vent. 335; *Anon.* 1 Stra. 152; *Dunkin* v. *Man*, Sir T. Raym. 233; *Offey* v. *Best*, 1 Lev. 186; *Rex* v. *Inhabitants of Horsley*, 8 East, 408.

(*d*) *Rex* v. *Bettesworth*, Stra. 891, 1118.

(*e*) *Rex* v. *Hay*, 4 Burr. 2295; *Rex* v. *Dr. Hay*, 1 Bla. R. 640.

(*f*) *Rex* v. *Hay*, 4 Burr. 2295; *Lovegrove* v. *Bethell*, 1 Bla. Rep. 68.

(*g*) *Smyth's Case*, 2 Stra. 892.

(*h*) See *post*, 2d vol.; and Selwyn's N. P. 6th ed. 1662; Impey's Mandamus, Com. Dig. Mandamus; and Burn's J. tit. Mandamus, as to practice in general.

recent statute the costs of the application for a mandamus are in general in the discretion of the court; and if the party applying has acted courteously and properly, he may thereby frequently avoid the payment of costs, though in other respects he fail. (*i*)

First step to be taken by claimant.

In the *first* place, the party claiming admission to an office, or other right, and intending afterwards to endeavour to enforce his claim by motion for a mandamus, should frame a written and explicit notice of his claim, succinctly stating the grounds and reasons, and which may be somewhat in the form of a notice of appeal against a poor rate, or other objectionable proceeding; (*k*) he should then in the same notice, in a *courteous* manner, request admission to the office or performance of the other act within a reasonable time, naming a proper day and place, and that if inconvenient to the party required, then that he appoint another time and place. In the same notice it may be intimated, that in case of refusal to comply with the request, the party will be under the necessity to apply to the court as the only means of obtaining the right. At the same time, if a clear and positive opinion of counsel has been obtained in favour of the claimant, it will be a proper and candid measure to accompany the notice with a copy of such case and opinion, and request the party himself to take advice. If after such a precautionary measure the party should persist in his refusal, and the court should afterwards think that he did so improperly, then, under the above discretionary power, they would probably make him pay, or not allow him costs, according to the other circumstances of the case. The 12 Geo. 3, c. 21, as to citizens, burgesses, and freemen of any city, borough, &c., *recites*, that although a writ of mandamus to admit to the franchise at their instance be obeyed, the party applying for the same is nevertheless put to great trouble, delay, and expense, and that by the existing law he cannot recover his costs when the writ has been obeyed, *enacts*, that when any such party entitled to be admitted shall apply to the mayor or other person, officer or officers, who hath authority to admit, to be admitted a citizen, burgess, or freeman, and shall give *notice specifying the nature of his claim* to such mayor, &c. that if he shall not admit such person a citizen, burgess, or freeman, *within one*

(*i*) 1 Wm. 4, c. 22, s. 6; see *post*, 809, as to the costs; and see *ante*, 439, notes (*f*) and (*g*), as to small circumstances frequently influencing a court in their giving or refusing costs.

(*k*) See several forms of notice of appeal against poor rate, Burn, J., tit. Poor, Index, tit. *Precedents*; and see the numerous forms of various notices in the notes to the antecedent pages.

month from the time of such notice, the Court of K. B. will be applied to; and if such mayor, &c. shall refuse or neglect to admit such person, and a writ of mandamus shall afterwards issue, then the party applying for the same, (unless the court shall see *just cause* to the contrary,) shall obtain and receive from such mayor, &c. all the costs, &c. (*l*) In cases not within this act, it might be as well to observe the same provision in any notice which it is always expedient to serve.

Second application

At the appointed time there should be a second application in person to the proper officer, requesting admission, &c., and this should be in the presence of one or more proper persons to join in an affidavit. And at all events in case a personal interview or peremptory refusal to admit has not been obtained, it may be expedient to serve another notice, referring to the former, and the refusal or silence, and again requiring admission, and pointing out the loss or inconvenience that will result from continued refusal, and the necessity that will ensue for the expense of proceedings in the Court of King's Bench, and the power of that court over the costs.

Affidavit to support motion to the court.

In the event of continued refusal, then an *affidavit* or affidavits should be sworn on the part of the claimant, fully and explicitly stating the nature of the office, and showing its duties and other facts essential to establish that it is of a *public* nature. (*m*) And where it is a corporation by prescription, the constitution of it, as well as the party's particular right under it, must be verified by affidavit. (*n*) And where it is by charter, the substance as applicable should be stated, and an authenticated copy must be produced at the time of making the motion. (*n*) The election and other circumstances under which he claims, and still claims to be admitted, must be very distinctly and positively stated, and shown to have been according to the charter or prescription, and this not according to hearsay or mere belief. (*o*) The affidavit should also anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim. A copy of the notice or notices previously served on the mayor, &c.,

(*l*) 12 Geo. 3, c. 21.

(*m*) So an affidavit to support a mandamus to a clergyman to replace a parish clerk, at least had better show that it is an office *for life*, *Anon.* 2 Chit. R. 254. So in an affidavit in support of a motion for mandamus to justices to appoint overseers, it must be sworn that the *district* is, or at least that it is reputed to be, a village or parish, *Rex* v. *Bedfordshire*, Caldecot, 157; *Anon.* Lofft, 618; *Rex* v. *Bridgwater*, Cowp. 139; as to a *Hamlet*, see *Rex* v. *Wiltshire*, 1 Wilson, 138. In an affidavit for a mandamus to compel a *corporation* to pay a poor rate, it must appear that they had no distrainable goods, *Rex* v. *Margate*, 3 B. & Ald. 220; 2 Chit. R. 250, S. C.

(*n*) Bul. N. P. 200; Selwyn's N. P. Mandamus, 1076.

(*o*) Bull. N. P. 200; Selwyn, N. P. 1077.

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should be annexed and verified, and the service of each, and the non-compliance with the notice, also sworn to; and when any strong resistance is expected, any disputable or material facts should be corroborated by one or more respectable and experienced individuals.

Motion to the Court.

The proper affidavits having been obtained, the course in general is, upon production of such affidavits, to move for a rule *nisi*, (to show cause,) why a mandamus should not issue, though in some cases the rule will, as we have seen, be absolute in the first instance, and the writ will immediately be issued. When a rule nisi has been obtained, then if no sufficient cause be shown, the party will either submit, or a mandamus will issue, which will require a return either that the required act has been performed, or a formal and true return of an adequate excuse, and which is traversable; and if ultimately no sufficient cause be shown, or the return be insufficient, a *Peremptory Mandamus* will be issued.

Writ of Mandamus and other proceedings, and especially *Costs.*

The writ and return, and other proceedings, will be considered together with the other part of the full practice in the next volume. With respect to *costs*, at common law in general, after issuing the writ, no costs were to be paid or received, the king being considered the prosecutor, (*p*) though upon discharging a rule nisi for a writ of mandamus, the costs of the motion were in the discretion of the court. (*q*) In actions for a false return to the writ, the plaintiff, if he succeeded and obtained a verdict for damages, was entitled to costs, and the defendant, if he succeeded, was entitled to his costs, under the 4 Jac. 1, c. 3; (*r*) and the 9 Ann. c. 20, s. 1 & 2, provided that in the case of corporate offices, if there were a false return, and afterwards a peremptory mandamus issued, the prosecutor should have his costs; (*s*) and the 12 Geo. 3, c. 21, we have seen provided, that in case of refusal to admit after a month's notice, the Court of King's Bench might award him costs of a writ of mandamus though obeyed. (*t*) And now *in all cases* of application for *any* writ of *mandamus whatsoever*, the costs of such *application*, whether the writ shall be granted or refused, and also the costs of the *writ*, if the same shall be issued and obeyed, shall be in the discretion of the court, and the court is authorized to order and direct by whom and to whom the same

(*p*) Tidd, 9 ed. 946.

(*q*) Id. 949; *Rex* v. *Banks*, 3 Burr. 1453; *Rex* v. *Chester*, 1 T. R. 396, 405.

(*r*) Tidd, 9 ed. 949; Hullock's Costs, 2 ed. 325.

(*s*) He is also entitled to poundage; *Rex* v. *Mayor of Glamorgan*, 2 Smith's R. 8.

(*t*) *Ante*, 807, 808.

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shall be paid. (u) This act, as before suggested, renders it expedient to be particularly cautious and courteous in the proceedings antecedent to the application.

Rights of Persons enforced in *Equity*.

In *Equity* we have seen that some rights of *persons* may be *specifically* enforced by *Bill*, (the extent and application of which will be presently fully noticed;) and sometimes even more summarily on *Petition* and *Affidavit*, although no cause be depending. Thus a guardian may be appointed to an infant, and maintenance allowed, upon petition merely. (x) And though the Court of Chancery has no jurisdiction to appoint a guardian to an infant unless he has property; (y) yet as a usual expedient on the part of a relative who is anxious to secure due protection to an infant, he will make a small provision for the infant, (as an annuity of 5*l.* a year,) and which will give jurisdiction to the court to refer it upon petition to the Master to approve of a guardian and consider what is fit to be allowed for maintenance, and which reference will not be dispensed with excepting when the property is personal and small; in other cases a bill must be filed. (z)

II. Specific Remedies with regard to *Personal* Property and Contracts.

II. As respects *moveable Personal property*, at *law*, the only *specific* legal remedies for a person entitled to the possession is to *Replevy*, or to proceed by action of *Detinue*, and at law a mandamus would be refused whenever a party sets up a claim to the *possession*, and not merely the *inspection* of a public document. Thus the court refused a mandamus to churchwardens to deliver a vestry-book to the vestry-clerk, Lord Ellenborough saying, " If the muniments belonged to him as annexed to his office, he may bring an action of detinue or trover." (a) But there are very numerous cases of the *Inspection* of documents, rather of a *public* or *general* nature, being enforced by *Mandamus*, where the party applying does not claim any right to the possession, but merely requires an inspection of the documents in the possession of the rightful owner, such as court rolls of a manor, of which he is a copyholder. (b) And in which case, upon swearing to the right and necessity for the inspection, and a previous application and refusal, the Court of

Inspection of Court Rolls, &c.

(u) 1 Wm. 4, c. 21, s. 6.

(x) *Ex parte Salter*, 3 Bro. C. C. 500; *Ex parte Myerscomb*, 1 Jac. & Walk. 151; 1 Newl. Ch. Pr. 210.

(y) *In the matter of Talbot*, cor. Lord Eldon, 6 April, 1815, 1 Newl. Ch. Pr. 210; *ante*, 64, note (z).

(z) 1 Newl. on Cont. 210, 211; *ante*, 64, 69, note (s), 70, note (k), 702 (o); *Ex parte Jones*, 1 Russ R. 478.

(a) *Anon.* 2 Chitty's R. 255; *ante*, 792, n. (d).

(b) See the cases and practice, Tidd, 9 ed. 594, 595.

King's Bench, although there be no suit depending, will by writ of *mandamus* compel the lord and his steward to allow inspection when justice requires. (*c*) And although it has been held that a *freehold* tenant of a manor has no right to inspect the court rolls, unless there be some cause depending in which his right may be involved, (*d*) and that a freeholder ought not to be allowed to inspect the rolls in a case between himself and the lord relating to *Copyhold*, because the lord ought not to be obliged to assist the defendant to make out his case; (*e*) yet it seems now to be settled that it is immaterial whether or not a suit be depending; (*f*) and provided the applicant be a tenant of and within the manor, though not a copyholder, it should seem that in all questions as well between copyholders as between a freeholder and the lord, who is in the nature of a trustee for all his tenants owing him suit and service, and has a right to inspect the rolls relating to the concerns and property in the manor, (*g*) though it would be otherwise as to a stranger. (*h*) But a mandamus will not be issued even at the instance of a tenant of the manor to inspect the rolls for the purpose of supporting an indictment against the lord even for not repairing a road within the manor; (*i*) because in a criminal proceeding it is a rule at law, as well as in equity, not to compel a party to furnish *preliminary* evidence against himself. (*k*)

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Replevin is not (as until recently had been generally but erroneously supposed (*l*)) confined to cases of wrongful *distress*, but is an immediate summary remedy in all cases when there has been a *wrongful taking, even by force* or in any manner otherwise than by process in *execution;* and it should seem that even goods *illegally detained* may be replevied. (*m*) And even in cases of distress for a poor-rate, it has been recently decided that the sheriff is legally bound to grant replevy. (*n*) This

Other remedies at law, as *Replevin* and Detinue, &c.

(*c*) *Rex* v. *Shelly*, 3 Term R. 141; *Rex* v. *Lucas*, 10 East, 235; *Rex* v. *Tower*, 4 Maule & Selwyn, 162, *ante*, 792, 798.

(*d*) *Rex* v. *Allgood*, 7 T. R. 746; *Smith* v. *Davis*, 1 Wils. 104.

(*e*) Id. ibid.; Tidd, 9 ed. 595, n. (*b*), but see *Rex* v. *Lucas*, 10 East, 235, and quære as to the *generality* of that position; and is not the Lord bound to keep faithful rolls as to all *Copyholds* within his manor, as if he were a trustee for the copyholders?

(*f*) *Rex* v. *Lucas*, 10 East, 235.

(*g*) *Rex* v. *Tower*, 4 Maule & S. 162.

(*h*) 12 Vin. Ab. 146; *Crew* v. *Saunders*, 2 Stra. 1005.

(*i*) *Rex* v. *Lord Cadogan*, 5 Bar. & Ald. 902; 1 Dowl. & Ry. 559, S. C.; *Fleming* v. *St. John*, 2 Simons, 181.

(*k*) Id. Ibid.; *Fleming* v. *St. John*, 2 Simons, 181, S. P.; but see exception, *Green* v. *Weaver*, 1 Simon's R. 404; and *ante*, 730, n. (*t*).

(*l*) 3 Bl. Com. 146.

(*m*) *Ex parte Chamberlain*, 1 Schol. & Lef. 320; *Shannon* v. *Shannon*, Id. 324; *Le Mason* v. *Dixon*, Sir W. Jones, 173, 174; Year Books, 6 Hen. 7, 8, 9; *Bishop* v. *Viscountess Montague*, Cro. Eliz. 824; Cro. Jac. 50, S. C.; Com. Dig. tit. Replevin, A. and tit. Action, M. 6; Vin. Ab. tit. Replevin, B. pl. 2; Wilkinson on Replevin, 2, 3; and see 1 Chitt. Pl. 5 ed. 188, &c.; not when in *nature of execution cases*, Burn's J., Distress under Warrant.

(*n*) *Sabourin* v. *Marshall and another*, 3 Bar. & Adolp. 440; and see observations, Burn's J. 26 ed. Poor, 847, 848.

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is unquestionably the *best specific remedy at law* for the immediate return and securing of any moveable chattel; for though in an action of *detinue* ultimately the judgment and execution would be to recover and have back the thing detained, or the value, together with the damages occasioned by the detention, with costs; (*o*) yet in the mean time the thing may have been eloigned or destroyed, and the wrong-doer may have absconded or become insolvent. (*p*) And the same objection applies to an action of trover, in which also only damages are recoverable. In one case of an action of trover for partnership books, Lord Ellenborough intimated that the bringing an action of trover was not the most convenient remedy in a case of this nature, and said that he had heard Mr. Wallace express *his surprise that the remedy by replevin was not more frequently resorted to, as by means thereof the party might obtain possession of the specific chattel* of which he had been deprived, instead of an action *of trover*, in which he would only recover damages. (*q*)

Specific delivery of a chattel when enforced in *Equity*.

A Court of Equity will, upon bill filed, decree the *specific delivery* of certain chattels, which it is considered may be of *peculiar value* to the owner, perhaps much beyond their intrinsic value, such as *heir-looms* or title deeds; and where, in case of a *specific bequest* of a chattel, the executor has refused his assent, a bill in equity to compel assent and the delivery of the specific article may be the *only* remedy. Thus, although we have seen that it is considered beneath the dignity of a Court of Equity to enforce specific delivery of a purchased chattel, such as corn or hops, or the ordinary subjects of sale, in fulfilment of a mere personal contract, because the like articles might be readily purchased or obtained elsewhere, and the recovery of damages at law for the breach would therefore in general be adequate compensation, (*r*) yet it is otherwise with respect to some chattels, to which it may be supposed the owner is particularly attached, and in that respect to him are valuable beyond any pecuniary compensation. (*s*) Thus a specific delivery to the owner of *heir-looms*, and chattels in the nature of heir-looms, (*t*) as family pictures or family plate, (*u*) will be enforced; and where the tenure of the estate was by the delivery of a horn, the specific delivery may be enforced. (*w*) So

(*o*) *Detinue* also is a more extensive remedy than has been supposed. It lies although the goods were taken tortiously and even *by force*. See cases 1 Chit. Pl. 5 ed. 139 to 141.

(*p*) *Dore* v. *Wilkinson and another*, 2 Stark. R. 288.

(*q*) Id. ibid.

(*r*) *Ante*, 711, 713; and see *Glasiers* v. *Massie*, Cary, 82, and *post*,

(*s*) *Nutbrown* v. *Thornton*, 10 Ves. 163; *Fellis* v. *Read*, 3 Ves. 70.

(*t*) *Macclesfield* v. *Davis*, 3 Ves. & B. 16; and see other cases, Chit. Eq. Dig. tit. *Chattels Personal*, and tit. *Heir-loom*; and where see what are heir-looms.

(*u*) *Geoffry* v. *Davis*, Cary, 34.

(*w*) *Pusey* v. *Pusey*, 1 Vern. 273.

the specific delivery of an ornamental and valuable altar-piece, or other curiosity, or even a tobacco box, (*x*) or of any specific bequest, (*y*) and of a valuable picture delivered for a special purpose by an executor, (*z*) will be decreed; for in all these cases it may be presumed, that from various and obvious considerations, unnecessary even to be here suggested, the owner may reasonably esteem such articles much beyond any pecuniary remuneration that could be afforded at law as damages for the conversion of the article.

It seems also that presents made to and accepted by a lady during courtship and in faith of marriage afterwards broken off by her without adequate cause, may by suit in equity be recovered back, unless it should appear that the party was an adventurer improperly attempting by such gifts to win the lady merely for the sake of her fortune. (*a*) So a bill in equity has been sustained against a bailee to compel the redelivery of jewels, instead of compelling the bailor to proceed at law; and it was held that persons entitled to a part of them were not necessarily to be made parties. (*b*)

Some of the members of a lodge of Freemasons were allowed to sustain a suit in equity against the executor of a deceased member to have the dresses and other insignia delivered up, and an injunction was obtained, it being considered inconvenient to justice that *all* the members should be parties to the suit. (*c*) So where one joint-tenant or tenant in common assumes an unjust or exclusive possession or use or management of a personal chattel, it should seem that (as one tenant in common cannot sue his co-tenant *at law* in trover for any conversion short of *destruction*, (*d*) or in case for any injury that does not amount to waste or destruction, (*e*)) the best course is to file a bill in equity, by which proceeding (as in the case of part owners of a ship) *the proper and equally beneficial use and enjoyment of the chattel* may be decreed and enforced. (*f*)

When it is preferable to proceed in Equity.

In cases of this nature, of the wrongful taking or detention of a chattel, it will frequently be preferable to resort to a Court of Equity to compel specific delivery, for otherwise the rich might with impunity keep from the poor his specific property,

(*x*) *Somerset* v. *Cookson*, 3 P. Wms. 398. Tobacco-box, *Fells* v. *Read*, 3 Ves. 76.

(*y*) *Lowther* v. *Lowther*, 13 Ves. 95.

(*z*) Id. ibid.

(*a*) *Young* v. *Currel*, Cary, 54; *Robinson* v. *Cumming*, 2 Atk. 409.

(*b*) *Saville* v. *Tancred*, 3 Swanst. 141.

(*c*) *Lloyd* v. *Loaring*, 6 Ves. 773; Chit. Eq. Dig. 217; *post*, vol. 2, as to number of the parties.

(*d*) *Cubitt* v. *Porter*, *per* Littledale, J., 8 Bar. & Cres. 268; *Healt* v. *Hubbard*, 4 East, 117, 121; *Martyn* v. *Knowles*, 8 Term Rep. 115; Co. Lit. 200, a.; 2 Saund. 47, h., note (*n*); *ante*, 645.

(*e*) *Martyn* v. *Knowles*, 8 T. R. 145.

(*f*) Id. ibid.; and *ante*, 717, as to part owners of ships.; see in general as to remedies in equity *against* partners, *Const* v. *Harris*, 1 Turn. & Russ. 469 to 529.

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and insist upon his receiving only damages to be assessed by a jury, and the verdict for which would probably not much exceed the actual value of the article. Besides, a bill in equity is, immediately and before a final decree, a more perfect remedy than an action of detinue, because not only will the ultimate decree direct that the chattel shall be delivered to the owner, but also in the mean time, and pending the suit, an injunction will be granted to prevent the defendant from parting with or injuring the chattel; and he will be imprisoned if he do not comply with the decree. (*g*) It is however to be observed, that at law, in an action of *detinue*, the *defendant* has not, as has been supposed, the *option* of delivering up the goods or paying the value, (*h*) but on the contrary, the judgment and execution in an action of detinue are absolutely for the restoration of the chattel, if the same can be found, together with damages and costs; and only in the alternative as to the value, in case the chattel should be destroyed or eloigned.

But it has been considered that when an executor in that character seeks the recovery of a specific chattel, he must resort to law after he has obtained a discovery in equity. (*i*)

The advantage in Equity of securing the chattels pending the suit.

It should seem that immediately after a bill has been filed, and upon affidavit showing the specific right, and the danger of the chattel being damaged or lost, then immediately, and before final decree, an injunction or order to stay the disposal thereof will be granted, (*k*) for which reason, in some cases, this remedy in equity is clearly preferable to an action of detinue.

In other cases of pecuniary and other property, where there are joint-tenants, tenants in common, or partners, whether in an adventure or in a common trading concern, if there have been fraud or there be danger of loss to one or more of the co-owners by the misconduct of the others, then, upon a bill filed, the *fund* may be brought into court or otherwise secured, although there would be no remedy at law, and any dangerous abuse of mutual confidence will be restrained by injunction; (*l*) and a bill in equity lies to recover deposits paid by a shareholder in a joint stock company, where the project was afterwards discovered to be a bubble. (*m*) But we have seen that the

(*g*) *Walwyn* v. *Lee*, 9 Ves. 33; 1 Mad. Ch. Pr. 232.

(*h*) 1 Mad. Ch. Pr. 232.

(*i*) *Allen* v. *Smith*, Ridg. 288; Chit. Eq. Dig. tit. Chattels Personal, Executor, and Trover, *sed quære*. *Somerset* v. *Cookson*, 3 P. W. 398; *Saville* v. *Tancred*, 3 Swanst. 141.

(*k*) *Ximenes* v. *Franco*, Dick. 149; and see *Const* v. *Harris*, 1 Turn. & R. 496.

(*l*) *Blain* v. *Agar*, 1 Sim. 37; *Castland* v. *Lyster*, 1 Ridg. L. & S. 580; *Harley* v. *Schrader*, 8 Ves. 317; and see several cases, Chit. Eq. Dig. Partners, xi. 746, 747, 748; and *ante*, 704, n. (*b*.); but *semble*, in case of a partnership, a dissolution must be prayed, Id. ibid. When not, and other points, see *Const* v. *Harris*, 1 Turn. & R. 496.

(*m*) *Green* v. *Barrett*, 1 Sim. 45.

merely swearing to the existence of a strong temptation to abuse partnership effects, is not alone sufficient to induce the court to grant an injunction, but some actual or threatened abuse must be established. (*n*)

Delivering up of void Deeds enforced.

We have further seen that if a party is in possession of a *void deed* or instrument, but which might thereafter be attempted to be enforced, a Court of Equity will by injunction restrain proceedings, and order the instrument to be delivered up, (*o*) a power which a Court of Law, unless in cases of warrants of attorney and a few other particular cases, cannot exercise. (*p*) So although a deed or instrument *be valid*, yet, if in equity, it ought to be *delivered up*, the court will decree accordingly, unless each party has been guilty of fraud, and neither entitled to assistance. (*q*) So we have also seen that a Court of Equity will decree and *enforce the delivery of a proper deed* or other instrument, in pursuance of a party's contract. (*r*) Under particular statutes, to prevent the expense of a formal suit, certain persons standing in the situation of *Trustees* may, upon *Petition*, and without bill, be *compelled to execute conveyances*, or the conveyance may be dispensed with; thus an infant mortgagee or trustee may, under the 7th Anne, c. 19, upon petition, and without suit, be directed by the Court of Chancery or Exchequer to convey; (*s*) and the same provision has been extended to *Idiots* and *Lunatics*, *Feme Coverts*, &c.; (*t*) and there are other enactments of the same nature. (*u*)

The Conveyance and Delivery of a proper instrument enforced.

Suits against *Executors and Administrators*, for *Legacies* and *Distributive* Shares.

Suits for *Legacies* charged upon personal estates *were*, perhaps, originally exclusively cognizable in the *Ecclesiastical Courts*, as a branch of that testamentary jurisdiction which undoubtedly belongs to them; but at an early period as *Executors* and *Administrators* (*x*) have ever been considered to be *Trustees*, and as *all trusts* are particularly cognizable in *equity*, and as legatees instituting a suit in an Ecclesiastical Court have found the authority of that court inadequate to enforce a full *discovery* of assets, they were frequently, after the commencement of the suit there, driven into a Court of Equity for that purpose, therefore, to save a circuity of suit, and in ease of the suitors, Courts of Equity assumed and exercised concurrent and more complete

(*n*) *Glassington* v. *Thwaites*, 1 Sim. & Stu. 124; and see in general, *ante*, 704, 705.

(*o*) *Ante*, 709, 710; *Ex parte Earl of Uxbridge*, 6 Ves. J. 425; *Ware* v. *Horwood*, 14 Ves. J. 28; 1 Ves. & B. 224; *Hayward* v. *Dimsdale*, 17 Ves. 111; Chit. Eq. Dig. tit. Delivery up of Deeds.

(*p*) *Ante*, 695, n. (*d*), (*e*).

(*q*) *Ante*, 710, n. (*f*), (*g*).

(*r*) *Ante*, 710, 711.

(*s*) 7 Anne, c. 19, extended to counties palatine, &c. by 4 Geo. 3, c. 16.

(*t*) 4 Geo. 2, c. 10; and 1 & 2 Geo. 4, c. 114; 1 Wm. 4. c. 60.

(*u*) See the acts and decisions, 1 Newl. Ch. Pr. 212 to 248, and cases there collected; 1 Wm. 4, c. 60.

(*x*) *Tiffin* v. *Tiffin*, 1 Vern. 2; 2 Mad. Ch. Pr. 2.

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jurisdiction in the matter, by, in the first instance, enforcing the *discovery*, and afterwards *decreeing payment* of the legacy. (*y*) But in the exercise of this *concurrent jurisdiction* Courts of Equity necessarily adopted the law of that forum in which the suit was originally cognizable, and therefore it is that where a suit is instituted in equity for payment of a legacy charged upon the *personal* estate, if a question arise upon the right of the legatee to demand payment, it is governed by the *civil* law; whereas, if the legacy be charged on a *real* estate, the rules of the *common* law prevail, because in the latter case the jurisdiction of the Temporal Court is original and exclusive. (*z*) And therefore where legacies are by will charged upon *real* property, the Ecclesiastical Court has no jurisdiction. (*z*) In other cases of legacies payable out of *Personal* estate in general, the legatees have the option of suing for their legacies either in the Spiritual Court or in a Court of Equity, but the latter is now almost always resorted to, because, as we have just seen, the remedy given there is more effectual and complete, and concludes all parties by the judgment of the court in the distribution of the effects. (*a*)

If the legatee be a *married woman*, (*b*) or an *infant*, (*c*) then the suit can properly only be in equity; and if a suit be instituted by a husband or parent in the Spiritual Court for a legacy, payable to a married woman, (*b*) or an infant, (*c*) the Court of Chancery, upon bill filed, will grant an injunction, because the Spiritual Court cannot, like a Court of Equity, compel the husband to make an adequate provision or settlement before the husband will be permitted to receive the legacy, and it is a special jurisdiction of a Court of Equity to take care of the interests of infants. And, on account of the deficiency of the jurisdiction of the Ecclesiastical Court, either to compel an account, or pending the suit, to secure the assets, suits for *legacies* are seldom brought in the Ecclesiastical Court; nor is it an answer to a suit in equity on this subject, that a suit has already been commenced and is pending in the Ecclesiastical Court. (*d*)

So the Ecclesiastical Court cannot in any case compel an *Executor* to make *Distribution* of the residue amongst the

(*y*) *Keilly* v. *Monck*, 3 Ridgw. P. C. 243; *Kendall* v. *Kendall*, 4 Russ. Rep. 370; *Hurst* v. *Beach*, 5 Mad. R. 360; Chit. Eq. Dig. 597; *ante*, 112, note (*b*); 2 Mad. Ch. Pr. 1.

(*z*) *Barker* v. *May*, 9 Bar. & Cres. 489; *ante*, 112, note (*c*).

(*a*) Redes. Tr. Pl. 110; 2 Mad. Ch. Pr. 3.

(*b*) *Tanfield* v. *Davenport*, Tot. 114, and other cases; 1 Mad. Ch. Pr. 129.

(*c*) *Rotherham* v. *Fanshaw*, 3 Atk. 629; *Horrell* v. *Waldron*, 1 Vern. 26; 2 Ch. C. 58; Chit. Eq. Dig. 597, 598, 667; 1 Mad. Ch. Pr. 129.

(*d*) 2 Mad. Ch. Pr. 3, 4.

next of kin, because the claim upon him is in the character of a *Trustee* for the next of kin, and that court cannot enforce the execution of a trust, (e) or as it hath been said, any thing in the nature of a trust. (f) It is otherwise, however, as regards *Administrators*, because the 22 & 23 Car. 2, c. 10, s. 3, *expressly* authorizes the *ecclesiastical* judge to decree distribution in case of intestacy. But notwithstanding that enactment, it has been decided that an account and due distribution may be decreed in *equity* of an intestate's personal estate against an administrator, notwithstanding an account has been before taken and a distribution decreed in the Spiritual Court. (g) And when the personal estate is considerable, or when there is the least apprehension of insolvency or misconduct on the part of an administrator, it is certainly advisable, shortly after the death, to file a bill in equity, to prevent waste or loss. (h) In the case of an administrator who has become insolvent, it seems necessary, in order to subject his *sureties* to liability to be sued upon the *administration bond* on behalf of the next of kin for their distributive shares, to be essential, in order to bring the case within the terms of the condition, to institute a suit and *obtain a decree* in the Ecclesiastical Court for distribution, without which no action on such bond can be sustained. (i)

Delivery of a will or probate enforced summarily in spiritual courts.

So there is a specific remedy to compel the production and giving up of a *will or probate* which has been taken or improperly detained by an attorney or other person, under pretence of a lien or some other claim, and in respect of which a summary proceeding is sustainable. (k)

Jurisdiction as to validity of Will of Personal or Real Estate.

The Ecclesiastical Courts have exclusive jurisdiction, and the Court of Chancery has no jurisdiction to decide upon the *validity* of a will of *Personalty*, even in the case of alleged *fraud.* (l) On the other hand, the validity of a devise or will of

(e) *Farrington* v. *Knightley*, 1 P. Wms. 559; 2 Mad. Ch. Pr. 3.

(f) *Franco* v. *Alvares*, 3 Atk. 346,

(g) *Bissell* v. *Cortelo*, 2 Vern. 47; Mad. Ch. Pr. 580; *Howard* v. *Howard*, 1 Vern. 134; Chit. Eq. Dig. tit. Distribution and Jurisdiction, 597.

(h) *Ante*, 716, and note (h).

(i) *Archbishop of Canterbury* v. *Tappen*, 8 B. & C. 150; 2 Man. & R. 136, S. C.; *ante*, 552; *Archbishop of Canterbury* v. *Robertson*, *ante*, 716, note (h); and that no action at law lies for a distributive share, *Jones* v. *Tanner*, 7 B. & C. 542; unless it has been by the executors converted into a loan or debt, *George* v. *Harmans*, 1 Moore & P. 209.

(k) *Ante*, 513; and see 1 Williams on Executors, 186.

(l) *Jones* v. *Frost*, 1 Jac. & R. 466; *Jones* v. *Jones*, 3 Meriv. 161; *Pemberton* v. *Pemberton*, 13 Ves. 297; *Bennet* v. *Vade*, 2 Atk. 324; 9 Mod. 312, S.C.; nor can a will of *personalty* be *set aside* in *equity*, even on ground of *fraud*, but only in the *Spiritual Court*, *Ex parte Fearon*, 5 Ves. 647; *Kerrick* v. *Bransby*, 7 Bro. P. C. 437; *Warwick* v. *Gerrard*, 2 Vern. 8; *Nelden* v. *Oldfield*, Id. 76; 1 Madd. Ch. Pr. 258. The want of jurisdiction in a Court of Equity to set aside a will on the ground of *fraud* has frequently been regretted, but is admitted, *Ex parte Fearon*, 5 Ves. 647; 1 Mad. Ch. P. 258; see some cases contra, but not considered to be law, Chit. Eq. Dig. 597.

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Real property can only be determined in an action at law, or upon an issue *devisavit vel non.* (m)

Suits in *Prize Court* for restitution of *Captured* Ship or Goods, &c.

We have seen that *hostile captures,* or *seizure* in the nature thereof, made in or in relation to war, are not cognizable in any municipal court, and that a *Prize Court* is therefore specially appointed and authorized by commission from the king, directed to the judge of the Admiralty Court, and before whom all suits for *restoration* of the captured property must be instituted; (n) and this rule obtains so strongly, that no action can be sustained in the temporal or other courts even for false imprisonment, when connected with the detention of goods or ship under colour of a capture. (o) And though there might be equitable grounds upon which a Court of Equity might interfere to restrain a captor from proceeding to condemnation, yet an injunction to stay proceedings in the Admiralty Court (or rather Prize Court), in a suit for the condemnation of a ship, on the ground that a note had been unduly obtained from the captain acknowledging the right of capture, was refused, because the Court of Admiralty had sufficient authority to investigate the circumstances. (p) Where the property claimed is of less value than 100*l.*, then, for the purpose of avoiding expenses disproportionate to the claim, the Prize Court will permit the propriety of the capture or seizure to be litigated and decided without the expense of a formal suit; but as a fixed rule is essential, if the property be at all, as only a few pounds, above the value of 100*l.*, then a formal suit is essential. (q) But although the Prize Court has exclusive jurisdiction over *direct* questions of prize or capture, yet if any *trust* or partnership arise, a Court of Equity then has so far jurisdiction as to direct between whom the property recovered in the Prize Court shall be divided. (r)

III. *Real Property.*

III. As respects *Real Property,* we have seen when recourse may be had to the right of *re-entry* and of taking possession without any legal assistance. (s) We have also, in the outline

(m) 1 Mad. Ch. Pr. 258.

(n) *Ante,* 2, note (b); *Le Caux* v. *Eden,* Dougl. 594; *Elphinstone* v. *Bedreechund,* Knapp's R. 316 to 361; *Hill* v. *Reader,* 2 Sim. & Stu. 437, 451; 2 Russ. R. 608, S. C. See the full proceedings in a Prize Court, 3 Chit. Commercial Law, 608 to 618; and *ante,* 2, note (b).

(o) *Faith* v. *Pearson,* Holt's C. N. P. 113; 3 Bla. Com. 69, 70, note 11.

(p) *Anon.* 3 Atk. 350; 1 Madd. Ch. Pr. 130.

(q) *The Mercurius,* 5 Rob. 127, 128.

(r) *Hill* v. *Reardon,* 2 Russ. R. 608; and see *Pearson* v. *Belcher,* 4 Ves. 627; *ante,* 780, note (f); *Chaloner* v. *Sansom,* 1 Bro. P. C. 149.

(s) *Ante,* 646.

of private rights, injuries, and remedies, seen the *specific* remedies afforded by the statutes against *forcible entries and detainers*, enabling *justices of the peace* immediately to restore possession, (*t*) but that they are exceedingly reluctant to act, and can rarely be persuaded to do so; and, perhaps, as there are other remedies, as by indictment or by action of ejectment, and in the mean time an injunction to prevent waste might be obtained, the Court of King's Bench would not enforce the duty in a case where the practice has become obsolete. (*u*) But we will in the next volume consider the course of proceeding, as unquestionably it would be highly advantageous in many cases, especially during the long vacation, to revive the practice. (*x*)

Besides the statutes enabling magistrates on a summary proceeding to restore possession, the statute 8 Hen. 6, c. 9, enables a freeholder, who has been forcibly expelled, to recover back, under the judgment upon an indictment, the estate with treble costs, unless the offender has been in possession for more than three years; and the same remedy was afterwards extended to copyholders and tenants for years by 21 Jac. 1, c. 15. (*y*) And in case of paupers and others who have intruded into buildings or land appropriated to the poor, summary proceedings to recover possession have been introduced by statute; (*z*) and we have seen the summary specific remedy by the intervention of two justices in case of tenants owing half a year's rent, and having deserted the premises. (*a*)

There was also an ancient common law writ, *de domo reparanda*, still in force, though not in use, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the joint property, and which might be revived in

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(*t*) *Ante*, 375, 376.

(*u*) In *note, ante*, page 376, it has been supposed that a *mandamus* would issue; but that position may be questionable, as the court rarely interferes when besides mandamus there would be *any other remedy* (*ante*, 791; *Rex* v. *Cambridgeshire*, 1 Dowl. & R. 325); and in case of a forcible entry, there are several other remedies, as an indictment, upon which there would be judgment and process for restitution, *ante*, 377, 378; or an action of ejectment at common law, and in the mean time a Court of Equity would prevent waste, *ante*, 723. In general, however, the Court of King's Bench will award a mandamus to compel justices to take security on articles of peace from K. B. *Rex* v. *Lewis*, 2 Stra. 835; 2 Sess. Ca. 68, pl. 72, S. C.; and to justices to summon parties assessed to the poor rates, and grant warrants of distress, *Rex* v. *Benn*, 6 T. R. 198; *Harper* v. *Carr*, 7 T. R. 722; *Anon.* 2 Chit. R. 257; and to justices to back the warrant of distress, *Rex* v. *Kynaston*, 1 East, 117. But the court will not issue the writ if it be doubtful whether the justices can legally do the act to be required of them, and certainly would not when the doing the act would probably subject the justices to an action, *Rex* v. *Buckinghamshire*, 1 Bar. & Cres. 485; 2 Dowl. & Ry. 809, S. C.; *Rex* v. *Robinson*, 2 Smith's R. 271.

(*x*) *Post*, Part 3; and Burn's J. Forcible Entries.

(*y*) *Ante*, 37[illegible]78.

(*z*) 59 Geo. 3, c. 12, s. 17, 24, 25; *ante*, 378.

(*a*) *Ante*, 376.

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practice with utility. (*b*) And if there be two tenants in common of a house or mill, and it fall into decay, and the one is willing to repair and the other not, he that is willing may have a writ *de reparatione facienda.* (*c*) But this writ has fallen into disuse, and the remedy, when there is any between tenants in common and joint tenants, is usually in equity for contribution.

Of the same nature was the ancient common law writ *de curia claudenda*, still also in force, though not resorted to, by which an owner of an estate of inheritance of land (*d*) might compel the owner in fee of adjoining land specifically to repair the intermediate fences according to his prescriptive obligation. But that remedy has given way to the action on the case for not repairing, although by that proceeding only *damages* can be recovered, though a repetition of successive actions will generally have the ultimate effect of inducing the party to repair, to avoid accumulated expense. (*e*) But this writ could only be sustained by and against the owner in fee, and not by a termor or a commoner. (*f*)

Of the Jurisdiction of Courts of Equity to compel specific Performance of Contracts, and other acts in general. (*g*)

The Jurisdiction in *Equity* by *Bill* to enforce *specific* performance of *contracts*, and the delivery of accounts and of other rights, may in some degree be assimilated to the jurisdiction at *law* of the Court of King's Bench to compel specific performance of certain acts by writs of *Mandamus*, but with this general distinction, that the latter remedy is usually confined to the enforcement of *public* rights or duties; whereas the remedy in *Equity* principally relates to the enforcement of *private* rights or duties. Like the writ of mandamus, a party is not entitled to a bill for specific performance as of *right*, but it is always discretionary in the court, though that discretion, by a long course of decisions and practice, has in a great measure become fixed; (*h*) and it is now as much of course in Equity to

(*b*) See form of writ, Fitz. Nat. Brev.; *Cubitt* v. *Porter*, 8 Bar. & Cres. 269, *per* Littledale, J.; and see 1 Thomas, Co. Lit. 216, note 17; Id. 787.

(*c*) *Cubitt* v. *Porter*, 8 Bar. & Cres. 269.

(*d*) It lies only for a tenant *in fee*, for it is a writ of *Right*, Mich. 9 Ann. K. B., *Starr* v. *Rookesby*, 1 Salk. 126; Fitz. N. B. 128, B.

(*e*) As to the writ *de curia claudenda* in general, see Fitz. N. B.; Vin. Ab. tit. Fences; Bro. Ab. tit. Curia Claudenda.

(*f*) *Starr* v. *Rookesby*, 1 Salk. 336; Fitz. N. B. 128, B. C.

(*g*) As to the enforcement of specific *performance* of contracts, and other acts in general, see Newland on Contracts *per tot.*; and see history of this jurisdiction by Lord Erskine in *Halsey* v. *Grant*, 13 Ves. J. 76; 1 Madd. Ch. Pr. 360 to 444; and see Index, 2d vol. tit. Specific Performance; Sugd. V. & P. as to Sales; 3 Woodes. Vin. Lect. 420 to 476; Chitty's Eq. Dig. tit. Agreement, XI. 42 to 68.

(*h*) *Clowes* v. *Higginson*, 1 Ves. & B. 524; *Mortlock* v. *Buller*, 10 Ves. 294; 2 Dow, 510; *Moore* v. *Blake*, 1 Ball & B. 69.

enforce specific performance of certain contracts made by a competent person, and in its nature and circumstances unobjectionable, as the recovery of *damages* at law. (*i*) The jurisdiction referred to is not an arbitrary capricious discretion, but must be regulated by grounds and reasons that will make it judicial. (*k*) This is a high prerogative jurisdiction, so peculiarly appropriated to Courts of Equity that although the King in Privy Council exercises judicial magistracy over the plantations, yet it was holden, that that judicature could not compel specific performance of an agreement for settling the boundaries of two provinces in America, and the suitors were remanded to the equitable jurisdiction. (*l*) We have already suggested that that *Remedy* which places a party in, or restores him to the *precise situation* in which he is entitled to stand, and especially when it also affords him compensation for intermediate damage as well as costs, must obviously be preferable to any remedy which merely affords pecuniary compensation, and that therefore upon principle, the former remedy should be extended rather than narrowed, (*m*) but still it will be found essential that it should be limited by some established rules. (*m*)

From the cases collected in the able work upon *Contracts* within the jurisdiction of Courts of Equity, by Mr. Newland, it appears that the jurisdiction of Courts of Equity in compelling specific performance of a contract was assumed, and not original, and even so late as in Easter Term, 14 James 1, upon a motion to prohibit a suit of that nature in the Court of Marches of Wales, to compel the granting a lease, pursuant to a bargain, the Court of King's Bench said, without a doubt a Court of Equity ought not to do so, for then to what purpose is the action on the case and covenant, and Lord Coke said that this would *subvert the intention of the covenantor*, for he intended it to be at his election either to lose the damages or to make the lease, and they would compel him to make the lease, contrary to his will; and so it is if a man bind himself in an obligation to enfeof another, he may not be compelled to

(*i*) *Hall* v. *Warren*, 9 Ves. 608. It is not an *arbitrary* discretion. *Goring* v. *Nash*, 3 Atk. 186; *Jones* v. *Stratham*, Id. 389.

(*k*) Per Lord Eldon, 7 Ves. 35; *Ryall* v. *Rolle*, 1 Atk. 183; *Rex* v. *Wilkes*, 4 Burr. 2539.

(*l*) *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 447.

(*m*) But *semble*, that in *practice* the remedy has not, at least as regards personalty, been extended, for formerly there were instances of contracts for the transfer of stock having been specifically enforced, but of late the party has been left to proceed at law; *Nutbrown* v. *Thornton*, 10 Ves. 161; *Mason* v. *Armitage*, 13 Ves. 37.

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make feoffment, and a prohibition was granted. (n) But it will be observed, that this was most fallacious reasoning, for undoubtedly the professed intention of the covenantor in each case, was to grant the lease, or to enfeoff, and not to reserve the option of paying damages in lieu of performing the act, and Courts of Equity have properly considered that the doctrine and remedy at law is much less than complete justice, because a party who has entered into the covenant or agreement, is in *conscience* bound, not only to make compensation for the breach, when he *could* not perform it, but also actually to perform when it is in his power, and it is on this ground that a Court of Equity interposes, (o) and this high jurisdiction is incontrovertibly settled, and one of the most fruitful sources of business in these courts; and they enforce this assistance principally in those cases where courts of law are incapable of giving to the party the remedy which he seeks, and to which in conscience he is entitled. (p) Thus, in a contract for the purchase of a particular real estate, as the object of the buyer is to obtain that specific estate, the recompence in damages, which courts of law would afford him in an action against the seller for a breach of his contract, would not be an adequate remedy; and so with respect to an agreement for a lease for a term of years, the recovery of damages for afterwards refusing to grant, would be an inadequate remedy, and therefore equity will decree the specific performance of such agreements, and compel the granting and the acceptance of the conveyance or lease. (q) But, as we have before intimated, when speaking of *injunctions*, as respects contracts relating to mere *personal property*, it is considered that the same principles do not *in general* extend, because, if a party contract to deliver a certain quantity of corn or hops, or to transfer stock, and refuse to do either, the purchaser may readily purchase the like articles elsewhere, and the recovery at law of damages for the breach of the contract, sufficient to cover any temporary damage or advance of price, is considered an adequate compensation; and it has also been considered, that as relates to articles of merchandize, which vary according to different times and circumstances, if a Court of Equity should admit a bill, a specific performance might perhaps be attended with ruin to the

(n) Newland on Contracts, 88, 89, cites *Genings* v. *Bromage*, 1 Rol. Rep. 354, 368; *Hudson* v. *Middleton*, 2 Rol. Rep. 433; *Mollineux's case*, Latch. Rep. 172.

(o) See *Alley* v. *Deschamps*, 13 Ves. 228; 1 Redesd. Tr. Pl. 108; and *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 129; 1 Mad. Ch. Pr. 360, 361.

(p) Id. ibid.; Newl. on Contr. 88, 89.

(q) 1 Mad. Ch. Pr. 361.

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defendant, when in an action he might not have to pay more than one shilling damages, therefore, equity in general leaves such contracts to law, where also the remedy is so much more expeditious. (r) To this rule, however, there are exceptions, (s) and where a contract relating to personalty has been in part performed, and the purchaser has parted with his money, and then the vendor attempts to deprive him of the moveable chattels, or otherwise of the benefit of the contract, to a ruinous extent, then we have seen that a Court of Equity will in effect decree a specific and complete performance, by injunction against the wrongful act of the vendor; (t) and we have seen many instances where a Court of Equity will compel the delivery of a proper security or document in pursuance of a contract.

Not in a suit *infra dignitatem* where the sum is too small to be worth a suit in equity.

On the other hand, a Court of Equity will not, as it is said, entertain proceedings *infra dignitatem*, or rather will not, in *mercy to claimants*, interfere when the proper object in dispute is so small that the probable amount of even extra costs would render it inexpedient in prudence to proceed, and in which the costs would be ruinous perhaps as well to the complainant as to the defendant. (u) Thus equity will not entertain a suit where the value is under fifty shillings per annum, (x) nor any suit relating to a matter of very small value, especially if it be founded on a verbal contract, (too frequently and independently of the statute against frauds subject to doubts (y)); and we have seen that even in a case of injunction, the Chancellor expressed his doubt whether he had not *degraded* the dignity of the court by interfering by injunction to prevent the vendor of a coach concern from running an opposition coach, though contrary to his absolute covenant. (z) But to these cases there is an exception with regard to a suit on the behalf of the *Poor* of the parish, though for under forty shillings. (a) And there is an exception to the rule, not to interfere in enforcing contracts relating to personalty, in the case of a preliminary contract to

(r) Newland on Contracts, 89, 90; and cases, *post*, 853, 854, but the last reason seems questionable, see *post*, 853, 854.

(s) *Ante*, 712, and *post*, 853, 854.

(t) *Ante*, 711 to 715.

(u) As courts are instituted for the benefit of suitors, and not with a view to dignify the judges, and as they are always most dignified when anxiously administering justice according to law, in *small* as well as great causes, the more becoming expression and reason for refusing interference *at law*, is in *mercy to the* party himself; that is the avowed ground on which new trials, when the sum recovered is under £20, are refused, unless when the trial relates to a permanent or general right, when its importance is not confined to the single cause. See an instance *Turner* v. *Lewis*, 1 Chit. Rep. 265.

(x) *Townley* v. *Osney*, Carey, 74; *Owens* v. *Smith*, 2 Com. 715.

(y) *Hanby* v. *Northaye*, Carey, 76; and see other instances, Chit. Eq. Dig. Jurisdiction, ix. 4

(z) *Ante*, 713; *Smith* v. *Froment*, 2 Swanst. 332.

(a) *Parrot* v. *Pawlet*, Carey, 103.

enter into a more formal contract, so as to give the complaining party a more perfect remedy at law; (*b*) and where a party *seeks* to be relieved from a *penalty* of a bond or other contract forfeited by his want of punctual performance of a personal contract, equity will not relieve, except upon the terms of his performing the act cy prês, or paying the actual, damage sustained. (*c*)

Cannot at same time proceed at law for damages and in equity for specific performance.

We have seen, that, notwithstanding the pendency of an action at law to recover damages, a party may apply for and obtain an *Injunction.* (*d*) But the rule is otherwise with respect to bills for specific performance, for, although a vendor and vendee respectively have the option of proceeding at law or in equity, (*e*) he cannot do both, and after a decree for a specific performance against a defendant, the plaintiff cannot proceed by action at law on the contract for damages, and such action would be restrained by injunction. (*f*) But if a purchaser, upon a bill filed for specific performance, pay the purchase money without putting in his answer, and afterwards discover a fraud in the sale, he is not precluded from bringing an action for damages if he come recently after discovering the deception. (*g*)

Necessity for reference to cases relating to *Injunctions.*

Before we consider the extensive jurisdiction of Courts of Equity in decreeing specific performance of contracts, it is necessary to observe that many of the rules and decisions which we have considered respecting *Injunctions* against breaches of contract, will equally apply to *Bills for specific performance,* and must be kept in view, (*h*) injunctions being granted to *prevent active* breaches of contract, whilst decrees of specific performance are to compel a contracting party to *perform some act* pursuant to his contract.

Arrangement of the Rules and Practice relating to Bills for Specific Performance

For *Practical purposes* it may be expedient, *first,* to consider the *General Rules,* when or not a Court of Equity will *decree Specific Performance* of contracts; *secondly,* to examine separately and distinctly the instances of *particular Contracts* relating to the *Person, Personal* property and *Real* property; and *thirdly,* the *Practical Proceedings* and *Decree,* and these under the following heads:

(*b*) Newland on Contr. 92, cites *Buxton* v. *Lister,* 3 Atk. 382; *Pember* v. *Mathers,* 1 Bro. C. C. 52; and *Taylor* v. *Neville,* cited 3 Atk. 384.

(*c*) Newl. on Contr. 307 to 310; 3 Bla. Com. 326, b.; 1 Ch. Cas. 24; *Cage* v. *Russell,* 2 Vent. 352; *The Earl of Strafford* v. *Lady Wentworth,* 9 Mod. 22; *Hill* v. *Barclay,* 18 Ves. 63.

(*d*) *Ante,* 701, (c).

(*e*) Sug. V. & P. 205.

(*f*) *Reynolds* v. *Nelson,* 6 Mad. R. 290; Sug. V. & P. 220.

(*g*) *Jedwine* v. *Slade,* 2 Esp. R. 257; Sug. V. & P. 220.

(*h*) *Ante,* 695 to 730.

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I. THE GENERAL RULES. *First,* Each party must have been *competent* to contract and *mutually bound.*

As regards contracts in general, a Court of Equity will not decree specific performance unless the obligation to perform the contract was, at the time it was made, *mutual and reciprocally binding.* (i) Thus, if a necessary party to the contract, at the time of making it, was an *infant* or a *married* woman, so as not then to be absolutely bound, the court would not decree specific performance on a bill filed, although at his or her instance; (k) therefore, where it was discovered and urged that the plaintiff, in a bill for specific performance, was an *infant* at the time of the contract and also when the bill was filed, such bill was dismissed with costs, to be paid by the next friend; (l) and the Master of the Rolls said, that no case of a bill filed by an infant, for the specific performance of a contract made with him, has been found in the books, and that it was an admitted general principle of Courts of Equity only to en-

Infancy, when an objection.

(i) Newl. Contr. 91, 152, 153; 1 Mad. Ch. Pr. 423, 424.

(k) *Flight* v. *Bolland,* 4 Russ. R. 298; *Harnett* v. *Yielding,* 2 Scho. & Lef. 549; and see *Weale* v. *West Middlesex Water Works,* 1 Jac. & W. 358, 370, 373; *post,* 827, 828.

(l) Id. ibid.; but see 1 Mad. Ch. Pr. 423, note (m).

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force specific performance when the remedy is *mutual.* (*m*) He then adverted to the exception to that rule under the statute against frauds, and which establishes, that although a party filing a bill for specific performance had not himself signed the contract, yet he might sustain the bill against the party who had, (an exception, the propriety of which had been questioned by Lord Redesdale, on the ground of want of mutuality, but was supported, because the statute against frauds only requires the agreement to be signed by the party to be charged, and also because the plaintiff, by the act of filing the bill, had adopted the contract and made the remedy mutual,) (*n*) but that those reasons did not apply to the case of an infant. But perhaps if an infant purchaser, after he has attained twenty-one, and whilst the contract is open, and before the vendor has expressed any dissent, should affirm the contract, or even file his bill, (which might of itself be deemed such affirmance,) then his bill might be sustained. (*o*) In the first case, at all events, the remedy on behalf of the infant is only *at law,* where it has been held that infancy is merely a personal protection, that can be taken advantage of only by the infant himself. (*p*)

Marriage, when an objection.

As to *Married women* it is clear, that if a husband should contract for the sale of his wife's real estate, a Court of Equity will not decree him to procure her to join in a conveyance; (*q*) and it should seem, on the other hand, that unless the vendor-husband has, whilst the contract is open, and before filing his bill for specific performance, procured his wife to concur and execute the conveyance, and levy a fine when necessary, he could not sustain his bill against the purchaser. (*r*) But when an estate has been settled upon a married woman for her separate use, or when the legal estate is in trustees, specific performance might probably be enforced. (*s*)

Lunacy.

At law *Lunacy* is not in general any defence to an action on a contract; (*t*) but it would be otherwise in equity, especially if circumstances of fraud were practised by the claimant. (*u*)

Weakness of Intellects, when an objection.

And though Courts of Equity will not, as has been figuratively expressed, measure the size of people's understandings or

(*m*) *Flight* v. *Bolland,* 4 Russell, 301; Co. Lit. 2, b.

(*n*) *Per* Master of Rolls in *Flight* v. *Bolland,* 4 Russ. R. 301; *Martin* v. *Mitchell,* 2 Jac. & Walk. 427; *ante,* 115, 116, and notes.

(*o*) 9 Vin. Ab. 393, pl. 1; and see observations in *Flight* v. *Bolland,* 4 Russ. R. 300.

(*p*) *Warwick* v. *Bruce,* 2 Maule & S. 205; 6 Taunt. 118, S.C.

(*q*) Decided in *Martin* v. *Mitchell,* 2 Jac. & W. 425; admitted in *Flight* v. *Bolland,* 4 Russ. 299; and see Sugd. V. & P. 8 ed. 187 to 189; Newl. Contr. 103.

(*r*) *Semble,* id. and page 301.

(*s*) Sugd. V. & P. 8 ed. 187 to 191.

(*t*) *Baxter* v. *Earl Portsmouth,* 5 Bar. & Cres. 170; 2 Car. & P. 178, S.C.; but see *Sentence* v. *Poole,* 3 Car. & P. 1.

(*u*) Newl. Contr. 363; and *post,* 827, (*d*).

capacites, there being no such a thing as an equitable incapacity when there is a legal capacity, (x) yet *great weakness* of understanding, although not amounting to insanity, is always considered, when connected with circumstances of fraud or surprise, as forming a strong feature in the case; (y) and in these cases Courts of Equity will not only refuse specific performance, but also will, under circumstances, decree the contract to be delivered up to be cancelled. (z) As where a weak man, easily imposed upon, and seventy-two years old, conveyed an estate worth £40 a year to two persons in fee, in consideration of an annuity of £20 a year. (a) But great age and imbecility will not induce a Court of Equity to cancel even a voluntary deed, if it were well explained to the party, and he understood its terms. (b)

Intoxication.

If a contract be obtained from a man in a complete state of *Intoxication*, although that circumstance alone would not invalidate, yet slight evidence of circumvention or fraud would induce equity to set the same aside, or at least to refuse specific performance; (c) as if the party to an agreement were drawn in to drink, by the management of the person in whose favour it was signed. (d)

There must have been a contract binding *each* party to *future performance*.

But besides the necessity for each party being reciprocally bound in respect of competency, it is also a rule that the contract itself must have been so framed as to be *reciprocally* and *mutually* binding. It was partly on this ground that the case of *Wealer* v. *The West Middlesex Water Works Company* was decided. (e) That company was established by a statute for supplying the inhabitants of several districts with water at such terms *as they should mutually agree upon;* and a subsequent act provided, that the company should only demand *reasonable sums*, and it was determined that neither a bill for a specific performance of a supply of water, nor an injunction for interrupting an inhabitant's supply of water could be sustained, because there had been no *mutually binding contract* between

(x) 1 Mad. Ch. Pr. 280; Newl. Contr. 362; *Blackford* v. *Christian*, Knapp's R. 77; *Diamid* v. *Diamid*, 3 Wils. & Shaw, 37, S. P.; 3 Bligh, N. S., 374, S. C.; *Milnes* v. *Cowley*, 8 Price, 620.

(y) *Griffin* v. *Devouille*, 3 P. W. 130; and other cases, Newl. Contr. 363; 1 Mad. Ch. Pr. 280, 283; *Ball* v. *Munnins*, 3 Bligh, N. S. 1; *Blakeney* v. *Bagot*, Id. 237, 253; *Diamid* v. *Diamid*, Id. 374; 3 Wils. & Sh. 37.

(z) Id. ibid.; and *ante*, 709, 710.

(a) *Clarkson* v. *Harvey*, 2 P. Wms. 203; Newl. Contr. 365; 1 Mad. Ch. Pr. 283; *Martin* v. *Mitchell*, 2 Jac. & W. 413; and see *Blackford* v. *Christian*, Knapp's Rep. 73; *Diamid* v. *Diamid*, 3 Wils. & S. 37, S. P.; 3 Bligh, N. S. 374, S. C.

(b) *Pratt* v. *Barker*, 1 Simon's R. 1.

(c) *Craigh* v. *Holme*, 18 Ves. 14; *Say* v. *Barwick*, 1 Ves. & B. 95; *Johnson* v. *Medlicott*, 3 P. W. 130, note (a); *Northam* v. *Latouche*, 4 Car. & P. 140; *Pitt* v. *Smith*, 3 Campb. 33; *Fenton* v. *Holloway*, 1 Stark. R. 126; *Gregory* v. *Fraser*, 3 Campb. 454; Newl. Contr. 365.

(d) *Johnson* v. *Medlicott*, 3 P. W. 130, note (o); *Cory* v. *Cory*, 1 Ves. 19; *Cook* v. *Clayworth*, 18 Ves. 12.

(e) *Wealer* v. *West Middlesex Water Works*, 1 Jac. & W. 358, 370, 371, 373.

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the company and the inhabitant for a supply of water at a *fixed price*, and consequently neither the company was bound to supply, nor the inhabitant bound to take or pay for any water.

Secondly, The *Contract itself,* and requisites.

With respect to the *Contract itself,* the rule is, that a party who seeks specific performance by decree of a Court of Equity must establish that there has been a *certain* contract, *clear* in all its material terms, (*f*) and valid as well at common law (*g*) as under the provisions of the statute against frauds, (*h*) or that the defendant is precluded from objecting, on account of informality, by the circumstance of a material part performance of some part of the contract. (*i*)

Uncertainty terms.

In contracts for the payment of a sum of money, whether as the *price* of real property or otherwise, a specific *fixed price* is in general of the essence of the contract. (*k*) And if it appear even by parol evidence that one term of t e actual agreement was omitted, specific performance will be refused; (*l*) and neither at law nor in equity will any material stipulation not expressed be supplied; (*m*) nor has a Court of Equity power to alter the contracts of parties from an eventual change not contemplated at the time; (*m*) and where a material ingredient in the terms of a contract has been omitted, equity considers it as only resting in *treaty*, and will not decree a specific execution. (*n*) So in contracts of sale, if there be uncertainty as to the description or quantity of the lands proposed to be conveyed, the court will not decree specific performance; (*o*) unless, perhaps, in some cases, where the party who refuses to perform, himself drew the agreement, and occasioned the objected uncertainty. (*p*) And although in equity, where a written agreement expressly refers to a plan as an existing document forming a term in a contract, parol evidence is admissible for the purpose of identifying the plan, yet, unless the evidence of identity be clear and satisfac-

(*f*) As to the necessity for certainty in general as regards suits for Specific Performance, see *Whaley* v. *Bagnall*, 6 Bro. P. C. 48; *Moseley* v. *Virgin*, 3 Ves. 184; 1 Fonbl. Eq. 170; 1 Madd. Ch. Pr. 426.

(*g*) See the requisites of contracts in general, *ante*, 112 to 126; as respects contracts of sale or demise of real property, *ante*, 292 to 305.

(*h*) 29 Car. 2, c. 3, s. 1 & 4; *ante*, 292, 293.

(*i*) See *post*, 832, as to *part performance*.

(*k*) See in general Newl. on Contr. 151; and admitted in *Agar* v. *Macklew*, 2 Sim. & Stu. 422; *Emery* v. *Wase*, 5 Ves. 846; 8 Ves. 505; *Holcraft* v. *Hickman*, 2 Sim. & Stu. 134; *Lyndsey* v. *Lynch*, 2 Scho. & Lef. 7. The same point was decided at *law*, in K. B., A. D. 1821. See also *Wealer* v. *West Middlesex Water Works*, *ante*, 827, note (*e*); and 3 Chitty's Comm. L. 103, n. 2.

(*l*) *Garran* v. *Grimly*, 2 Swanst. 244; *Bayley* v. *Tyrrell*, 2 Ball & B. 363; *Hosier* v. *Read*, 9 Mod. 86. When otherwise, *Omerod* v. *Hardman*, 5 Ves. 730; *Whaley* v. *Bagnel*, 6 Bro. P. C. 45.

(*m*) *Ormond* v. *Anderson*, 2 Ball & B. 369; 1 Mad. Ch. Pr. 426, 427.

(*n*) *Bayley* v. *Tyrrell*, 2 Ball & B. 363.

(*o*) *Bromley* v. *Jefferies*, 2 Vern. 415; Newl. Contr. 151; but see id. 152, other cases *contrà*.

(*p*) *Clermont* v. *Tasburgh*, 1 Jac. & W. 115.

tory, specific performance of such an agreement will be refused.(*q*) We have in the preceding part considered the *certainty* required in a contract, and when or not it is valid and may be enforced;(*r*) and contracts relating to leases and sales of real property in particular have been stated.(*s*) When the contract attempted to be enforced would otherwise be invalid under the statute against frauds, it is advisable, though not absolutely essential, in the bill to charge that it was in writing and duly signed, or to charge fraud or other circumstance, such as part performance, necessary in equity to entitle the party to the interposition of the court.(*t*)

There has been some contradiction in the decisions upon the question whether the court will enforce an agreement to *sell real* property "for a *price or sum of money to be fixed upon by two or more named persons* appointed by the agreement, or by two persons indifferently to be chosen as surveyors or appraisers, one to be chosen by the vendor and the other by the purchaser," in cases where no valuation has been made, and one of the parties has declined to appoint a valuer on his part.(*u*) In one of the latest cases upon the subject, where the vendor had so declined, specific performance was refused, (*x*) and the Vice-Chancellor said, "I consider it to be quite settled that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration, nor will in such case substitute the master for the arbitrators, which would be to bind the parties contrary to their agreement;" and he considered the decisions upon agreement to refer to arbitration as analogous.(*y*) So where two surveyors, who it had been agreed should fix the price of an estate, stated in their valuation the sum to be paid and the quantity of land, and that if it proved to be less, either 84*l.* or 42*l.* should be deducted, according to the parts of the estate in which the deficiency occurred, but did not state either the quantity supposed to be contained in each part, or that so much per acre should be deducted, it was held that such valuation was uncertain, and that a specific performance, after a reference to the master, would not be enforced in favour of the purchaser.(*z*) It had been previously held, that

(*q*) *Hodges* v. *Horsfall*, 1 Russ. & M. 116.

(*r*) *Ante*, 11[illegible] to 130.

(*s*) *Ante*, 292 to 301.

(*t*) *Ante*, 117, notes (*r*) & (*s*).

(*u*) *Ante*, 294, note ([illegible]).

(*x*) *Agar* v. *Maclew*, 2 Sim. & Stu. 418, A. D. 1825, observed upon Sugd. V. & P. 8th ed. 254.

(*y*) *Agar* v. *Macklew*, 2 Sim. and Stu. 423; and see *Milner* v. *Gery*, 14 Ves. 400; and see *post*, 851, as to the decisions upon agreements to refer.

(*z*) *Hopcraft* v. *Hickman*, 2 Sim. & Stu. 130; and see *Emery* v. *Wase*, 5 Ves. 846; *Blount* v. *Bestland*, Id. 517; *Hall* v. *Warren*, 9 Ves. 605; *Parker* v. *Whitby*, 1 Turn. & Russ. 366.

where there is a contract to sell at a valuation to be made by *A. B.* and *C.*, the court would compel the vendor to permit the valuation. (*z*)

But if a *valuation has been actually and fairly made* by an arbitrator or valuer for a fair price before any dissent of either party, then equity will enforce the contract; (*a*) and it has even been held that the appointed valuers may take the opinion of any third person as *evidence*, though they could not delegate their *decision* to a third person. (*b*) Upon the whole, the rule seems to be, that if an agreement be made to sell at a fair valuation *generally*, without naming particular valuers or mode, the court will execute it, although the value has not been fixed or ascertained, because as no particular means of ascertaining the value are pointed out, there is nothing to preclude the court from adopting any means proper to be used for that purpose. (*c*) But that where parties have agreed upon a *specific mode* of valuation, as by *two* persons, one chosen *by each*, then, unless the price has been fixed in the way pointed out, the court cannot enforce the performance of the agreement, for that would be not to execute their agreement, but to make a new one for them; and therefore where the agreement was to sell at a valuation by arbitrators to be appointed, or their umpire, and arbitrators were appointed, and differed as to value, and could not agree upon an umpire, the court refused to interfere, because a price fixed by the master of the court could not be a valuation made pursuant to the agreement of the parties. (*d*)

There are cases of contracts of sales of a mixed nature, or of real and personal property, where the price of the former has been fixed, and a general valuation of the latter only to take place, and which has been specifically enforced; as where the lease or interest and good-will in a public house has been sold at a fixed price, and the stock is to be valued fairly, where the court have decreed specific performance. (*e*)

(*z*) *Morse* v. *Merest*, 6 Mad. & Gel. 26.

(*a*) *Emery* v. *Wase*, 5 Ves. J. 346; 8 Ves. 505, S.C.; *Hall* v. *Warren*, 9 Ves. 605; *Blundell* v. *Brettarch*, 17 Ves. 241; and see *Dakin* v. *Cope*, 2 Russ. 170; 1 Mad. Ch. Pr. 426; Sugd. V. & P. 252. But if the prices were *clearly inadequate*, the court would not decree specific performance, *Parken* v. *Whitby*, 1 Turn. & Russ. 366.

(*b*) *Hopcraft* v. *Hickman*, 2 Sim. & Stu. 130.

(*c*) *Milner* v. *Gery*, 14 Ves. 407.

(*d*) *Milner* v. *Gery*, 14 Ves. 400; *Gregory* v. *Mighall*, 18 Ves. 328; *Gourlay* v. *Somerset*, 19 Ves. 429; and see *Cook* v. *Jackson*, 6 Ves. 34; *Wilks* v. *Davis*, 3 Meriv. 507; *Pritchard* v. *Ovey*, 1 Jac. & W. 396; *Agar* v. *Macklew*, 2 Sim. & Stu. 418; Sugd. V. & P. 252, 253; Newl. Contr. 151; *ante*, 294, n. (*e*). The same point was decided at law in K. B. A. D. 1821; see 3 Chitty's Com. L. 103, note 2, *accord*; but see *Morse* v. *Merest*, 6 Mad. & Geld. 26; Sugd. V. & P. 254, *contra*.

(*e*) *Dakin* v. *Cope*, 2 Russ. R. 170; *Gostaller* v. *Till*, 1 Russ. 376.

When it may be referred to a *Master* to settle the terms of a *lease*.

But although a contract of *sale* must in general be certain in itself, or the court will not decree performance, yet where a contract *for a lease* is incomplete merely in form, or in some particular which the court can in the exercise of its ordinary jurisdiction supply, it will then take upon itself to render it conformable with the apparent intention of the parties, to be collected from cases under similar circumstances to which it may be presumed the parties themselves probably referred, notwithstanding the loose manner in which the terms of their contract may have been expressed; (*f*) as for instance, where the agreement was for a *lease*, "with such usual and proper conditions and agreements as shall be judged reasonable and proper by John Gale, surveyor," the court referred it to the *master* to settle the terms, and not to Gale. (*g*) So where in an agreement for a lease, the rent, and the commencement and duration of the lease are uncertain, or made dependent upon the approbation of a third person, the court will refer it to the master, or direct proper issues to ascertain these several facts before any specific performance of the contract will be decreed, (*h*) especially if the tenant has occupied under the agreement. (*i*) And in general, specific execution of an agreement for a lease will be decreed with proper covenants, or according to the general practice as to such leases, and not contradicting the incidents of the lessee's estate; one of which is the right to have it without restraint, except what is imposed by law, as assignment, unless an express contract has been made to the contrary. (*k*)

Illegal consideration or tendency vitiates.

But equity will not decree specific performance if the object of the agreement were in any respect inconsistent with the rules of public policy, although not absolutely declared void by any enactment. (*l*)

Thirdly, The Specific Performance must be *entire*.

Courts of Equity cannot, on behalf of a vendor, decree the performance of one part of an agreement, leaving the other part unperformed. (*m*) But a purchaser may sometimes have a specific performance in part, waiving the rest, and the defendant cannot object; (*n*) but there are exceptions to this rule. (*o*)

Fourthly, What acts of *part performance* are material and

We have seen the necessity for contracts to grant leases, or to sell any interest in land, to be *in writing*, and *signed* by the parties to be charged. (*p*) But in many cases where a contract has

(*f*) *Allen* v. *Harding*, 2 Eq. Ca. Ab. 17; 1 Fonbl. Eq. 173.

(*g*) *Gourlay* v. *Somerset*, 19 Ves. 429; *Milner* v. *Gery*, 14 Ves. 400.

(*h*) *Plunket* v. *Lord Kingsland*, 1 Bro. P. C. 322.

(*i*) *Gregory* v. *Mighell*, 18 Ves. 333.

(*k*) *Church* v. *Brown*, 15 Ves. 264.

(*l*) Newl. Contr. 157; 1 Mad. Ch. Pr. 409.

(*m*) *Wood* v. *Rowe*, 2 Bligh, 595.

(*n*) *Mestaer* v. *Gillespie*, 11 Ves. 640.

(*o*) Sugd. V. & P. 278 to 283.

(*p*) *Ante*, 292, 293.

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sufficient to take a verbal contract out of the statute against frauds.

been imperfect in these respects, yet a *substantial part performance, effected as such*, will in equity entitle either party (whether he be the intended lessor or lessee, or vendor or purchaser), by bill in equity, to compel the specific performance of the whole. (q) The enumeration of all the rules and decisions upon this subject would be beyond our present object. It seems that although an agreement for a lease has been uncertain in some part of its terms, as that the *rent* shall be fixed by arbitration, or a third person, which has not been done, yet if the tenant has substantially occupied under the agreement, and in part performed it, the court will refer it to the master to fix the rent, rather than suffer it to be rescinded in toto. (r)

Fifthly, Circumstances inducing the courts to refuse specific performance

There are some *circumstances* which may or not take away the right to a specific performance or induce the Court to refuse it, and these we will consider under the following heads.

1. Fraud, 833.
    1. Misrepresentation, 833.
    2. Concealmente, 837.
2. Ignorance, 838
3. Inadequacy of Price, 838.
4. Consequences of Vendor being unable in part to complete the entire Contract, 839.
    1. Cannot demise or convey entirety of Interest in the whole Estate, 839.
    2. Cannot demise or convey so large an Estate, 840.
    3. Cannot convey an Estate of the like quality, 841.
    4. Cannot convey of like Dimensions, 841.
    5. Cannot make a perfect Title according to Conditions, 842.
    6. Cases of Compensation, 842.
5. Subsequent Circumstances inducing Court to refuse Specific Performances, 844.
    1. Felony of intended Lessee, 844.
    2. Insolvency, 844.
    3. Breaches of Covenant, 845.
    4. Change in other Circumstances, as Destruction by Fire, Deaths, &c. 845.
    5. Consequences of Laches or Delay as to Time, 847 to 849.

(q) See in general Sugd V. & P. 107, 108, 110, 117, 118, 123, 1 Madd. Ch. Pr. 376, 380, &c., Chitty's Eq. Dig. 58 to 60; *Gunter* v. *Halsey*, Amb. 586; *Kine* v. *Balfe*, 2 Ball & B. 343; *Morphett* v *Jones*, 1 Swanst. 172, *Clinder* v *Cooke*, 1 Scho. & Lef. 11, *Pilling* v. *Armitage*, 12 Ves. 78, *France* v. *Dawson*, 14 Ves. 386.

(r) *Gregory* v. *Mighell*, 18 Ves. 333

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As it is always *discretionary* to *grant* a specific performance, or to leave the parties to law, if it be established that any *fraud* is imputable to the vendor, or if there has been any *mistake* or *surprise* that operates in conscience against his demand to have the contract performed, it is an answer to his appplication. (s)

1. Fraud.

First, Misrepresentation.

Fraudulent representations, or even *wilful concealment* or *suppression* of any *material fact* in the knowledge of a vendor or purchaser, although only to a small extent, would in general induce a Court of Equity to refuse specific performance at his instance, (t) though it might be enforced against him. (u) It is a well established maxim applicable to this branch of the law and to policies of insurance that *fraud, whether suggestio or allegatio falsi, or suppressio veri,* will avoid the contract. (x) Many of the cases upon this subject are ably collected by Mr. Maddox. (y) Material *misrepresentations* of bye-gone or supposed existing facts in obtaining any agreement will have this effect. (z) Thus a *verbal* misrepresentation by the auctioneer at the time of the sale as to the quantity of land would be a good defence to a bill for specific performance, (a) and even false representations by a vendor that he *intended* to make improvements upon land *adjoining* that offered to be sold, will have the same effect. (b)

With respect to *misrepresentations when innocent,* then, in some cases, in order to deter a Court of Equity from granting specific relief, it must have been *material,* and to such an extent as substantially to vary the spirit of the contract, for if not *so material* nor wilful, the court would compel the purchaser to complete the contract, accepting only a *compensation* for the deficiency in quantity or value in the estate. But if a *wilfully fraudulent* misrepresentation be established even as to a *small part* of a contract, the party guilty of it is entirely precluded from asking for a decree of specific performance, even of a part of the contract, or even upon his waiving the part affected by the misrepresentation; for the effect of *fraudulent* misrepresentation is not to alter or modify the agreement

(s) *Per* Master of the Rolls in *Beaumont* v. *Dukes*, Jacob's R. 424.

(t) *Calmam* v. *Hammer*, 18 Ves. 10; *Clermont* v. *Tasburgh*, 1 Jacob & W. 112, A. D. 1819, *Beaumont* v. *Dukes*, Jacob, 422, A. D. 1822; *Shirley* v. *Stratton*, 1 Bro. C. C. 440; Newl. Contr. 156, 213, 214. What is or not fraud to induce a court to refuse assistance, Newl. Contr. 213 to 227.

(u) Newl. Contr. 156, 157; *Mestaer* v. *Gillespie*, 11 Ves. 640.

(x) See the principle and numerous instances, Sug. V. & P. 8th edit. 158, 194, 288; Park on Insurance; Marshall, id.; Hughes, id.

(y) Madd. Ch. Pr. 404, 405.

(z) *Supra*, note (t).

(a) *Winch* v. *Winchester*, 1 Ves. & B. 375; *Flood* v. *Finley*, 2 Ball & B. 15.

(b) *Beaumont* v. *Dukes*, Jacob's Rep. 422.

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pro tanto, but to destroy it *entirely*, and to operate as a personal bar in equity to the party who has practised it; (*c*) and therefore where a bill was filed for the specific performance of an agreement to exchange estates, and it was established that such agreement was signed by the defendant upon the faith of the plaintiff's verbal false representation that his tenant and the defendant's had assented to such exchange without qualification, when in truth they had only assented to give up their occupations on the terms of being paid the value of their respective interests, the Court of Chancery refused specific performance, although the plaintiff offered to pay the tenants the amount of their claims. (*c*)

So where an agreement for a lease of Covent Garden theatre was obtained by a proposed lessor by his materially misrepresenting facts to the proposed lessees, it was held that they were justified in refusing the lease, *although they had possession for more than two years*, and the Vice-Chancellor having decreed otherwise, the Chancellor reversed that decree and the House of Lords affirmed the reversal. (*d*) But if the

(*c*) Per the Master of the Rolls in *Clermont* v. *Tasburgh*, 1 Jac. & Walk. 112 to 122; and *Cadman* v. *Horner*, 18 Ves. 10, where see the rule and principle ably elucidated.

(*d*) *Harris* v. *Kemble*, 2 Dow. & Clark's Rep. 463 to 479, overruling same case in 1 Simons, 111. In this case, by agreement under seal, of 11 March, 1822, between Harris and the defendants, the latter agreed to accept a lease from Harrison, a trustee for the plaintiff, and then of Covent Garden theatre, for a term of years, and plaintiff gave up possession of the theatre to the defendants, *and they* exclusively managed the same for several months. At the time of such agreement it was represented by the plaintiff that Sir E. Antrobus was lessee of a box in the theatre for a term at an annual rent of 240*l.* whereas it afterwards appeared that Sir E. Antrobus had purchased such interest in the box for 2000*l.*, paid to the plaintiff and his father, which fact was not communicated to, *but concealed from the defendants*. There was also another fact nearly of the same nature concealed. The defendants proceeded in the management of the theatre for nearly two years, and then having discovered these facts, they refused to execute a lease but at a reduced rent, and thereupon the plaintiff in A. D. 1824, filed his bill in Chancery for a specific performance or the acceptance of a lease in modified terms. The defendants resisted this on the ground of fraud. The Vice-Chancellor, Sir John Leach, 11 April, 1827, decreed a specific performance. On an appeal to the Chancellor Lyndhurst, he, on 26 May, 1829, reversed such decree on the ground of the fraud, and, *inter alia*, gave judgment as follows: "Now I believe it is a universal principle in this court, where a party calls for a specific performance of a contract, he must, as to *every part of the contract*, be free from every imputation of *fraud or mistake*. It is not sufficient to say that security may be given or security may be obtained upon the property; it is a personal bar to the proceedings of this court; it is a personal bar and may be a bar in a court of law; it is a personal bar to the party making application for a specific performance. I think I am justified in saying, according to the established practice of this court, if nothing had been done under this agreement, if the parties had not taken possession under it, if Mr. Harris had not given up the management, but that the agreement alone had been executed; under these circumstances it appears to me impossible to suppose that this court could have listened to an application for the purpose of enforcing a specific performance of this agreement, either generally or subject to modification. The question, therefore, comes to this, whether in consequence of the conduct of the parties, in consequence of their *taking possession* as they have done, and in consequence of their having *dealt with the property* in the way they have done, whether that state of things is such as to lead the court to enforce this agreement by a decree of a specific performance. Mr. Harris gave up the management of the whole concerns of the theatre to these gentlemen, an

thing concealed or omitted to be stated was *too trifling* to affect the ground of the contract or work any injustice or affect the interests of the party, the Court would, notwithstanding such concealment or omission, decree specific performance of the agreement. (*e*) Where the agreement is of doubtful and suspicious character with respect to the fairness of the terms or mode of obtaining it, the Court will not decree specific performance; and though a length of time has elapsed, that, under circumstances, will not imply acquiescence. (*f*)

Supposing the party deceived has, before he has discovered the fraud, taken possession and had a partial benefit from the contract, still, unless there has been perfect *bonâ fides* on the part of the other party, he cannot, on account of such partial benefit, compel specific performance, (*g*) but must seek his remedy, if any, for the temporary use of the property or other benefit, by another and different proceeding. (*h*) It must be kept in view that these cases of *fraud* are quite distinguishable from that class of cases in which the contract having been *in all respects fair on* each side, yet it cannot be literally performed in all its parts, and when the Court will modify it, attending to the substance of it, and carry it into execution free from the collateral circumstances that form the difficulty. There are cases of this kind where, from lapse of time, it has become unconscientious to insist upon the agreement *modo et forma*, or where there happens to be a small deficiency in the

agreement was entered into containing certain stipulations. It is stated that they have altered the theatre contrary to the directions contained in the contract, and have thereby materially injured the theatre. They have also, it is said, by the manner in which they have conducted the theatre, affected its interests most materially. It is obvious, however, that all this is *matter of account* and compensation, and does not render it necessary to enforce this agreement by decreeing a specific performance. It appears to me, therefore, considering that at the time when the bill was filed two years only had elapsed and eight years more remained; taking into consideration what I have observed with respect to the conduct of the parties during the negociation, and considering their relative situations, that this court ought not, under all the circumstances, to interfere for the purpose of compelling a specific performance; and I do not think that there is any thing arising out of the conduct of the parties taking possession and acting towards the property in the manner they did during the time they were in possession; taking all the circumstances into consideration, I do not think there is sufficient arising out of the conduct of the parties to the agreement of March, 1822, to justify the court in decreeing a specific performance.

I am of opinion that this agreement of 1822 ought not to be specifically performed, and cannot be specifically performed in general; it is admitted it cannot without modification, but I am of opinion that it ought not to be specifically performed without any modification, but that the parties ought to be left to their remedy either in this court or to adopt such proceedings at law as they may be advised. MS. and also from the shorthand-writer's note of the judgment.

(*e*) *Fellowes* v. *Lord Gwyder and Page*, 1 Symons, 65, confirmed in 1 Russ. & Mylne, 89, cited above.

(*f*) *Blakeney* v. *Baggott*, 1 Dow. R. New S. 405.

(*g*) See observations in *Clermont* v. *Tasburgh*, 1 Jac. & W. 120; and see Lord Lyndhurst's judgment in *Harris* v. *Kemble*, *supra*, n. (*d*).

(*h*) See Lord Lyndhurst's suggestions, *supra*, n. (*d*).

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number of acres; the contract in such a case becomes inoperative at law and cannot be strictly performed, yet the Court of Equity will decree it, dispensing with the articles that are not essential to the substance; but this is only where there has been *a perfect boná fides*, and there is no case where it has been done at the instance of a plaintiff who has practised *any misrepresentation*. (*i*)

What is a *material* misrepresentation.

Even a misrepresentation by a vendor of the *value*, or the yearly value, of an estate, has been holden sufficient to induce the court to refuse specific performance; (*k*) and in general, misrepresentation, though in a slight degree, is an objection to enforcing specific performance, though it might not be sufficient to induce the court to rescind the contract. (*l*) With respect to misrepresentation of value the secret employment of *puffers*, not known to be *boná fide* bidders, will vitiate a sale; and where the particulars of sale by auction stated that such sale would be *without reserve*, and yet puffers were employed, specific performance was refused; (*m*) and indeed the contract of purchase would in that case be as void at law as in equity. (*n*) But the statute imposing the auction duty allows a private bidding by *one* person though not by several. (*o*)

Puffing.

What misrepresentation *not material*. (*p*)

But where a piece of land imperfectly watered in part was described in the particular as *uncommonly rich water meadow*, it was held that this was not such a misrepresentation as would avoid a sale; because the representation was to be taken as nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance, and therefore was decreed to complete his purchase. (*q*) So where *A.*, on contracting with *B.*, falsely represented himself to be the agent of *C.*, and thereby obtained better terms, the court would nevertheless enforce the contract against *B.*, as it did not appear that *A.* knew that such would be the effect of the misrepresentation. (*r*)

(*i*) *Per* the Master of the Rolls, *Clermont* v. *Tasburgh*, 1 Jac. & W. 120; and see *Hill* v. *Buckley*, 17 Ves. 349.

(*k*) *Walls* v. *Stubbs*, 1 Mad. 80; *Brereton* v. *Cowp*, 1 Bro. P. C. 211.

(*l*) *Cadman* v. *Homer*, 18 Ves. 10; *Rockfort* v. *Creswick*, 1 Bro. P. C. 171.

(*m*) *Meadows* v. *Tanner*, 5 Mad. 34; Sug. V. & P. 8th edit. 24, 26, 195.

(*n*) *Wheeler* v. *Collier*, 1 Mood. & M. 123.

(*o*) Sugd. V. & P. 21, 24, 195; *Wheeler* v. *Collier*, 1 Mood. & M. 123. It is very absurd that a bidder at an auction should be influenced by the biddings of others, but whilst the weakness of mankind in that respect continues, it seems proper to prevent the indiscriminate employment of sham purchasers.

(*p*) See at law, *Early* v. *Garrett*, 9 Bar. & Cres. 928.

(*q*) *Per* Vice-Chancellor, *Scott* v. *Homer*, 1 Sim. Rep. 13, and see *post*, 841.

(*r*) *Fellows* v. *Lord Gwyder*, 1 Sim. 63.

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Secondly. Concealments.

With respect to *Concealments*, if a material fact within the knowledge of the vendor or purchaser, and which, if communicated, would have probably changed or altered the terms on the part of one of the parties, be concealed, that fact will avoid the contract and preclude the party guilty from sustaining a suit for specific performance. (*s*) Thus where the fact of a notice to repair having been served by the landlord, was concealed from the purchaser of a lease, although he knew that the premises were out of repair, and under which notice the landlord re-entered and evicted the purchaser, this was held a fraudulent concealment, and the purchaser was allowed to avoid the contract and recover back his deposit money, on the ground that in *such transactions good* faith is most essential, and that it was the duty of the vendor or his agent to have communicated the fact. (*t*) So where a *purchaser* knew that the vendors, the assignees of a bankrupt, were ignorant of a circumstance considerably increasing the value, but concealed that fact from them, no specific performance would be decreed, and even a Court of Equity would decree the contract to be cancelled. (*u*) So where a lessee for lives applied for and obtained an agreement from the lessor for a renewal, but concealed the fact of the last life being *in extremis*, specific performance was refused. (*v*) And though in general a purchaser is not bound to give the vendor information respecting the value of the property, as for instance, he is not bound to tell him there is a mine under the surface, (*x*) yet a very little is sufficient to affect the application of that principle; and if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate. (*y*) In these cases, especially of contracts of sales improvidently entered into by a *trustee* or *assignee*, though a Court of Equity may not go so far as to cancel the agreement, yet specific performance will be refused, but the party who unjustly seeks it will be left to his remedy at law, in which, perhaps, he will only recover nominal damages against the ignorant vendor. (*z*) Another reason why Courts of Equity refuse specific performance in the case of sales by trustees or assignees, is, that thereby loss to the estate and the *cestui que trust* is

(*s*) *Ante*, 833; *Ellard* v. *Landaff*, 1 Ball & B. 241; *Readred* v. *Griffith*, 1 Bro. P. C. 314.

(*t*) *Stevens* v. *Adamson*, 2 Stark. 422; Sug. V. & P. 286; see *Shirley* v. *Stratton*, 1 Bro. C. C. 410; Sug. V. & P. 195.

(*u*) *Turner* v. *Harvey*, Jacob, 169; *Stilwell* v. *Wilkins*, Id. 282, S. P.

(*v*) *Ellard* v. *Landaff*, 1 Ball & B. 241; see also *Readred* v. *Griffith*, 1 Bro. P. C. 314.

(*x*) *Per* Lord Thurlow in *Fox* v. *Mackreth*, 2 Bro. C. C. 420.

(*y*) *Per* Lord Chancellor in *Turner* v. *Harvey*, Jacob, 178.

(*z*) *Turner* v. *Harvey*, Jacob, 178; *Bridger* v. *Rice*, 1 Jac. & W. 74.

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avoided, and the damages must be paid by the trustees or assignees out of their own pocket, when they have been guilty of negligence. (z)

Good faith is so essential in all transactions of sale of real estates, that if a material fact be concealed relating to the title after the contract, and before the completion, the vendor may, pending proceedings upon a bill filed to complete the purchase, upon motion, be discharged from his purchase, although he had taken possession, and although the concealed claim had been released. (a)

Part performance by party deceived after notice of the fraud when excludes objection.

If an agreement be in part performed by a party after knowledge of the supposed fraud, surprise or mistake, then equity will not set aside the agreement, but will compel specific performance of so much that can be executed, as it will be considered that he has waived the objection. (b)

2. Ignorance of one party. (c)

2. So the party against whom a contract is required to be enforced must not only have had legal competency and capacity to contract, but also must have duly exercised his faculties, for otherwise a specific performance will be refused, and the party praying it left to his remedy at law by action for damages; as if the contract were *improvidently entered into by an illiterate ignorant person,* in the absence of his solicitor, to sell his reversionary interest by private contract for a sum under the real value. (d) In such a case a Court of Equity says, "make the best of your case with a jury." (e) So deeds improvidently entered into by persons uninformed of their rights will be sometimes set aside though obtained without any actual fraud or imposition. (f) And especially trustees and assignees will not be compelled to perform an agreement entered into under mistake to sell for an inadequate consideration. (g)

3. Inadequacy of Price. (h)

3. In general, mere *indequacy* of price is not sufficient to induce the court to refuse specific performance, but there may

(z) *Ante,* 837, n. (z).

(a) *Dalby* v. *Pullen,* 3 Simon, 29; 1 Russ. & M. 296; *Harris* v. *Kemble,* 834, n. (d).

(b) *E. Anglesey* v. *Annesley,* 1 Bro. P. C. 289.

(c) See *ante,* 299, as to weakness of intellect.

(d) *Martin* v. *Mitchell,* 2 Jac. & Walk. 413; see the judgment, 421 to 423; *Stilwell* v. *Wilkins,* Jacob, 282; *Hamilton* v. *Grant,* 3 Dow, 33; 1 Bligh, N. S. 594; and see Newl. Contr. 358, 432 to 434.

(e) *Hamet* v. *Yielding,* 2 Scho. & Lef. 549; Sugd. V. & P. 282.

(f) *Evans* v. *Llewellyn,* 2 Bro. C. C. 150; 1 Cox, 333; and *per* Lord Chancellor in *Turner* v. *Harvey,* Jacob, 172; *Stilwell* v. *Wilkins,* Jacob, 282; *Mason* v. *Armitage,* 13 Ves. 25.

(g) *Bridger* v. *Rice,* 1 Jac. & W. 74; and see *Turner* v. *Harvey,* Jacob, 178, 826.

(h) See *ante,* 826, as to weakness of intellect; and see in general 1 Mad. Ch. Pr. 119, 267, 281, 425.

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and have been cases of such inadequacy when so great as to form a ground even for cancelling a contract.(*i*) But in general, bargains, though *hard* and improvident, will be enforced in the absence of fraud.(*k*).

4. Consequences of vendor being unable in part to convey strictly according to contract.

4. The *inability* of a vendor to make a *perfect title* to the *entire thing* as agreed to be sold, may be principally of five descriptions.

First. He may not be able to convey the *entire* interest in the estate sold.
Secondly. He may not be able to convey so *large an estate* in the property as proposed.
Thirdly. The objection may be to the *quality* of the estate as described.
Fourthly. He may not be able to make out a title to *so much in quantity*.
Fifthly. The *title itself* may be imperfect.

In the first, second, and fifth cases it should seem that specific performance will not in general be decreed. In the third and fourth cases it may or not with an abatement in price, but depending on other circumstances, as whether the deficient quantity was so material as to have influenced the intention of the purchaser in buying.

First, Thus when a vendor sells the *entire interest*, and he can only make out a title to an undivided share therein, as tenant in common or otherwise, he cannot compel the purchaser to complete the purchase, unless he can also procure a conveyance by the other tenants in common; for it may be very material to a purchaser to have the entire and exclusive interest;(*l*) and this although the inability to convey the entirety was wholly attributable to the death of one tenant in common between the contract and the time of completion;(*m*) and the purchaser's right to a conveyance of the entire estate, and right of exclusive possession, is so strictly preserved, that he is not compellable to accept a conveyance, if it should appear that the estate is subject merely to a reserved liberty of sporting by a third person.(*n*) And it seems immaterial how small may be the interest which the vendor is unable to convey, as if he could only convey nine-sixteenths when the contract was for the entirety, (*o*) or even six-sevenths of the whole.(*p*) But the *pur-*

(*i*) *Stilwell* v. *Wilkins*, Jacob, 282; and see *Western* v. *Russell*, 3 Ves. & B. 187; *Coles* v. *Trecothic*, 9 Ves. 248; *Keen* v. *Stukeley*, in Scacc, Gilb. Eq. R. 155; *Legal* v. *Miller*, 2 Ves. 299; *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 313; *Gorman* v. *Salisbury*, 1 Vern. 240; see in general Newl. Contr. 65, 357, 358.

(*k*) *Willes* v. *Jernegan*, 2 Atk. 251; 1 Madd. Ch. Pr. 281.

(*l*) *Roffey* v. *Shallcross*, 4 Mad. R. 227; *Dalby* v. *Pullen*, 3 Simons, 29; 1 Russ. & Myl. 296; Sugd. V. & P. 274.

(*m*) Id. ibid. But the *purchaser* might enforce a conveyance of the share, *Attorney-General* v. *Gower*, 1 Ves. 218; Sugd. V. & P. 278.

(*n*) *Burnell* v. *Brown*, 1 Jac. & W. 168; Sug. V. & P. 277.

(*o*) *Wheatly* v. *Slade*, 4 Simons, 126.

(*p*) *Dalby* v. *Pullen*, 3 Simons, R. 29; 1 Russ. & M. 296, S. C.

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chaser in these cases might enforce the bargain and insist on a proper reduction from the stipulated price.(q)

Secondly; A purchaser will not be compellable to take a materially different *estate*, either *in tenure* or in quantity, to that contracted for; as if he contracted for *a freehold* interest, he will not be compelled to accept a term, however long in duration, even for 4000 years, (r) nor copyhold in lieu of freehold, (s) for the incidents of these estates are totally different. But if an estate be sold as copyhold, and represented as equal in value to freehold, the vendor may be compelled to convey, though it turn out to have been really freehold. (t) In either of these cases, if the purchaser proceed without objection after knowledge of the variance, he will then be considered as having waived the right to object. (u) As respects the purchase of a *term for years*, the general rule is, that the purchaser is entitled to insist upon having substantially the like term in *duration* as that professedly bargained for, and if the term be considerably less than that bargained for, specific performance would not be enforced. (x) But in equity, as well as at law, if the deficiency in the term be not considerable, the contract may be enforced; (x) and at law, a slight variation, when unattended with fraud, will not invalidate the contract or excuse the purchaser from refusing to complete; as where "the unexpired term of *eight years'* lease and good-will" was agreed to be sold, whereas at the time of the agreement the term was only *seven years and seven months*, Lord Ellenborough held that the purchaser was bound to complete. (y) And the neglect to mention in a contract of sale a small *fixed outgoing* of a fee-farm rent of 5*s.* 4*d.* charged upon the property sold, and other very considerable property, was considered no objection even at law. (z) So even a money payment of 14*l.* per annum *in lieu of tithes*, although the estate was described as tithe-free, was held to be a case of *compensation*, and that the purchaser was bound to complete, although it would have

(q) *Attorney-General* v. *Gower*, 1 Ves. 218; *Hill* v. *Buckley*, 17 Ves. 394, cited in *Wheatley* v. *Slade*, 4 Simons, 126. But note that was a case of deficiency in *quantity*; and see Sugd. V. & P. 278.

(r) *Drew* v. *Corp*, 9 Ves. 368; *Halsey* v. *Grant*, 13 Ves. 78, *Fordyce* v. *Ford*, 4 Bro. C. C. 497; *Calcraft* v. *Roebuck*, 1 Ves. J. 226; Sug. V. & P. 264, 274, 275.

(s) *Twining* v. *Morrice*, 2 Bro. C. C. 326; *Hick* v. *Phillips*, Prec. Ch. 575; *Lewis* v. *Lord Lechmore*, 10 Mod. 504.

(t) Id. ibid.; Sug. V. & P. 275.

(u) Sug. V. & P. 276.

(x) Sug. V. & P. 264, 266, and cases there cited.

(y) *Belworth* v. *Hassell*, 4 Campb. 140; Sug. V. & P. 264, 265.

(z) *Turner* v. *Beauram*, Sug. V. and P. 265, note (c); and see *Howland* v. *Morris*, 1 Cox, 59; Sug. V. & P. 272, observing upon *Lord Stanhope's case*, 6 Ves. 678, 679, *post*, 843.

been clearly otherwise decided, if the estate had been subject to tithe in kind. (a)

Thirdly, As to objection to the *quality* of the thing sold as described in advertisements or in the contract of sale, in most cases on this head the rule *caveat emptor* strictly applies, and therefore, although there be defects in the property sold, yet if they are *patent*, the purchaser can have no relief. (b) Purchasers are supposed not to be influenced by the too luxuriant and embellishing descriptions of auctioneers, and it is presumed that they will, in person or by agent, look at or at least inquire into the nature of the estate, the state of repairs of buildings, and the nature of the soil, and state of cultivation of land; and therefore where a meadow was sold without any notice of a footway round it, or of one across it, which of course lessened its value, Lord Rosslyn decreed a specific performance with costs, saying he could not help the purchaser, who did not choose to inquire, and it was not a latent defect. (c) So we have seen that where a meadow but imperfectly watered was described as "uncommonly rich water meadow," this misdescription was held not to excuse the purchaser from completing his contract. (d) There are numerous cases to this effect. (e) But if there be any *false statement* or *concealment* of a material fact, especially if it be not patent on the view of the estate, then the purchaser will be either discharged from completing his contract, or will be entitled to compensation on the ground of fraud. (f) As where a vender gave a false description of the estate, stating it to be but one mile from a borough town, and it turned out to be between three and four, the contract was held voidable by the purchaser. (g)

Fourthly, When a vendor cannot establish a title to a *very material part* of the thing sold, then the purchaser will not be compelled to accept a conveyance of a part, although with an abatement upon the purchase money; (h) as if at an auction several lots, connected and complicated with each other, be purchased at the same time, and a title to one cannot be made, a specific performance cannot be enforced against the purchaser; as if a purchase was made of a mansion-house in one lot, and adjoining farms in others, and no title could be made to the lot con-

(a) Sug. V. & P. 272.
(b) *Lowndes* v. *Law*, 2 Cox, 363; Sug. V. & P. 283.
(c) *Oldfield* v. *Round*, 5 Ves. 508; but see observations in Ball & Beat. Rep. 250, and *Legge* v. *Golner*, Id. 500.
(d) *Scott* v. *Thomson*, 1 Sim. 13.
(e) See Sug. V. & P. 284 to 294.
(f) *Ante*, 833, to 838, and Sug. V. & P. 284 to 294.
(g) *Duke of Norfolk* v. *Worthy*, 1 Campb. 337; and other cases, Sug. V. & P. 285.
(h) *Roffey* v. *Shallcross*, 4 Madd. R. 227; Sug. V. & P. 268, 270; and see distinction between a large and small deficiency in *Wheatley* v. *Slade*, 4 Simons, 127.

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taining the mansion-house. (*i*) But when *distinct* purchases are made, although at the same time and auction, of several lots, not materially complicated with each other, and at different prices, then the purchaser will be compelled to accept a conveyance of those unconnected lots, to which sufficient title has been established. (*k*) As regards *quantity of land* in general, a small deficiency will be no ground for vacating the contract, unless where there has been fraud, and at most the purchaser will be entitled to compensation or abatement for the deficiency, when the contract was to pay at so much per acre, or the precise quantity was by mistake misdescribed. (*l*)

Fifthly, The inability of a vendor *to make a title* is a principal and leading objection; and if one of the terms of an agreement of sale be that the contract should be void, if the *purchaser's counsel* should be of opinion that a *marketable title could not be made* by a certain time, then, however unwise such a stipulation may have been, yet if the counsel have given an opinion against the title, a bill against the purchaser for specific performance would be dismissed, although other counsel might correctly advise that the title was sufficient. (*m*) In other cases, where there has been no express stipulation relative to the title, a purchaser is not obliged to accept a title doubtful in fact or law, as if the construction of a will be too *doubtful* to be settled without litigation and decision. (*n*) At law the only question is whether or not a *good* title has been made, and the question is not whether it be doubtful. (*o*)

Cases of Compensation.

We have seen that *fraud* in a very small respect will preclude a party from compelling the party deceived to perform the contract; (*p*) but that *mistakes*, if they do not affect the essence of the bargain, will not, at least in a Court of Equity, have that effect, (*q*) and upon making compensation for the difference in value, the rest of the contract may be specifically en-

(*i*) *Poole* v. *Shergold*, 2 Bro. C. C. 118, cited and approved in *Lewin* v. *Guest*, 1 Russ. 330; 1 Cox, 273; *Drewe* v. *Hanson*, 6 Ves. 676; Sug. V. & P. 268 to 274.

(*k*) *Lewin* v. *Guest*, 1 Russ. 325; *Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; 6 Ves. 676; Sug. V. & P. 268 to 274.

(*l*) See cases Sug. V. & P. 294 to 303; and see *ante*, 841, n. (*h*), *Wheatley* v. *Slade*, 4 Simons, 127, observing upon *Hill* v. *Buckley*, 17 Ves. 394.

(*m*) *Williams* v. *Edwards*, 2 Simons, 78.

(*n*) *Sharp* v. *Adcock*, 4 Russ. 374. What is or not considered a doubtful title, and the rule at law, *Gall* v. *Esdaile*, 8 Bing. 326, 327; and what acknowledgment of title is conclusive against a purchaser, *Bowman* v. *Gutch*, 7 Bing. 379.

(*o*) *Bowman* v. *Gutch*, 7 Bing. 379.

(*p*) *Ante*, 833, 834.

(*q*) At law the variance would in general be fatal, though otherwise in equity; *Stapleton* v. *Scott*, 13 Ves. 426; *Halsey* v. *Grant*, 13 Ves. 77. In equity a *small variance is not fatal*, as in case of a sale of lease of 99 years, and it turns out to be only 98 or 97 years, Id. ibid.; so even at law, when the variance is *very trifling*; *Belworth* v. *Hassell*, 4 Campb. 140; *ante*, 840, note (*y*).

forced; for *per* Lord Chancellor Eldon, "the principle upon which Courts of Equity act is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not *strictly* complied with the terms so as to entitle him to an *action*, (as to time for instance,) yet if the time, though introduced, as some time must be fixed where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract; a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a Court of Equity will compel the execution of the contract upon this ground, that the one party is ready to perform, and that the other party may have a performance in *substance* if he will permit it." (*s*) So specific performance of an agreement for sale of an estate will be decreed, upon the terms of making compensation, notwithstanding a variance from the description, though a minute examination might have discovered the defect, as in the state of an house or other property; but not when the variance was in describing the premises as lying within a ring fence, that being considered a most important consideration. (*t*) And in enforcing contracts, upon the principle of compensation for variance in description, the court has *confessedly* gone so far as even, in some cases, to defeat one real object of the purchaser. (*u*) The court, in such cases, treat the contract of purchase as a mere investment of money, and that the purchaser ought to be content if he have in some land and in compensation an equivalent. Thus subsequently discovered outgoings, not before discloseed, if of a limited nature and not affecting the *tenure*, will merely entitle the purchaser to compensation, and will not enable him wholly to rescind the bargain. (*x*) Thus where a purchaser, wanting to be a freeholder of Essex, purchased an house in the Isle of Dogs, which he supposed to be in Essex, but which was in fact in Kent, he was compelled to complete his bargain. (*y*) But in another case, where the agreement was entered into for the purchase of a house *for a coffee-house*, and it was discovered that a chimney could not be made convenient for a coffee-house, Lord Talbot dismissed the vendor's bill for specific

(*s*) In *Hearne* v. *Tenant*, 13 Ves. 287.

(*t*) *Dyer* v. *Hargreave*, 10 Ves. 505; *Halsey* v. *Grant*, 13 Ves. 73; *Hornblow* v. *Shirley*, Id. 81; *Stapleton* v. *Scott*, Id. 426.

(*u*) *Drewe* v. *Hanson*, 6 Ves. 675.

(*x*) *Howland* v. *Norris*, 1 Cox, 59; *ante*, 840, 841, notes, (*z*), (*a*).

(*y*) *Shirley* v. *Davies*, cited 6 Ves. J. 678.

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performance, merely because it would compel the purchaser to take a house for a purpose he did not want. (y)

Subsequent circumstances, to induce refusal of Specific Performance.

There are *other circumstances* that may have arisen *since* the contract was made, which may induce a Court of Equity to refuse a decree of specific performance.

Felony of intended lessee.

Thus if it be discovered that an intended lessee has committed a *felony*, the court would not compel the intended lessor to execute a lease to him. (z)

Insolvency.

As respects *Solvency*, it will be obvious that in a contract of *Sale*, if the purchaser, or his assignees or representatives, tender the purchase money at the appointed time, the general insolvency of such purchaser is wholly immaterial. (a) But in an agreement for a *Lease*, the covenants and stipulations to be observed by the intended lessee being matter of *future* performance during the *whole* currency of the lease, his failure before a lease has been granted raises a substantial and reasonable continuing objection to the completion of the contract; (b) and therefore his *insolvency* is a decided objection and bar to a bill for specific performance; (c) and the bankruptcy of a lessee constitutes ground for refusing the renewal of a lease. (d) But as there may be exceptions to these cases, as where the assignees of the intended lessee offer adequate security, (e) it seems improper to *demur* to a bill on the ground that the objection is absolutely a bar. (f) Where there has been a stipulation in the agreement that the lease should contain an absolute covenant in restraint of assignment, then it is clear that assignees cannot enforce a lease. (g) And where a tenant, a trader, who has agreed to sell a lease, has committed an act of bankruptcy, although no commission has been issued, he cannot compel specific performance. (h) And although notwithstanding an intended lessee has become insolvent, an injunction may be obtained against an action of ejectment on the demise of the lessor, and

(y) 1 Ves. Sen. 307; *Halsey* v. *Grant*, 13 Ves. J. 78.

(z) See *dictum* in *Willingham* v. *Joyce*, 3 Ves. J. 186; 1 Mad. Ch. Pr. 421.

(a) *Goodman* v. *Whitbody*, Dans. 153; *Orlebar* v. *Fletcher*, 1 P. W. 737; *Bowles* v. *Rogers*, 6 Ves. 95; *Whitworth* v. *Davis*, 1 Ves. & B. 545; Sug. V. & P. 162.

(b) 1 Mad. Ch. Pr. 421, 422; Newl. Contr. 256; and *per* Lord Redesdale, *O'Hertily* v. *Hedges*, 1 Scho. & Lef. 123; but see *De Minckwitz* v. *Udney*, 16 Ves. 466, *contrà*.

(c) *Buckland* v. *Hall*, 8 Ves. 92; *Brook* v. *Hewitt*, 3 Ves. 253; Newl. Contr. 256.

(d) *Drake* v. *Exeter*, 1 Ch. C. 71; *Willingham* v. *Joyce*, 3 Ves. 168; *Flood* v. *Finlay*, 2 Ball & B. 9; and see other cases, 1 Mad. Ch. Pr. 422.

(e) Id. ibid.; *Drake* v. *Mayor of Exeter*, 1 Ch. C. 71; but there is no case of assignees being entitled to a specific performance; *Flood* v. *Finlay*, 2 Ball & B. 9.

(f) Newl. Contr. 260, *supra*, note; and see *Boardman* v. *Moystyn*, 6 Ves. 467.

(g) *Wetherall* v. *Geering*, 12 Ves. 504.

(h) *Lowes* v. *Lush*, 14 Ves. 547; *Franklin* v. *Brownlow*, Id. 550; *Cann* v. *Cann*, 1 Sim. & Stu. 284.

continued *pending* a suit against the landlord for a specific performance; (*i*) yet, if ultimately the insolvency and other circumstances show the party to be an unfit tenant, such an injunction will be dissolved. (*k*)

Breaches of Covenant.

The court will not refuse a decree of specific performance of a contract to grant a building lease, on account of the plaintiff, the intended lessee, having erected a brewhouse on land injurious to the lessor's property, (*l*) or having contracted to underlet contrary to the agreement for the lease. (*m*) But it would be otherwise if the breaches were wilful and obstinate, or by the terms of the agreement would have exhibited grounds of forfeiture; (*n*) and in the case of a common agreement for a lease, if before the lease has been executed the intended lessee should commit gross waste, or treat the land in an untenant-like manner, or commit gross breaches of the intended covenant, no specific performance would be decreed. (*o*) So if the agreement stipulated against assignment, and nevertheless the occupier has assigned, he could not compel the execution of a lease. (*p*) So where a landlord had recovered in ejectment in respect of the breach of an husbandry covenant contained in an agreement for a lease, the court refused the execution of the intended lease. (*q*)

Change of other circumstances, as destruction by fire, deaths, &c.

When there has been a *change in any material circumstances*, or alteration of the property referred to in the previous agreement, so that it could not be enjoyed according to the stipulations, the court will, in some cases, refuse to decree specific performance of any part of the stipulations. Thus, where the agreement was for the renewal of a lease of certain premises, part of which was afterwards (but previous to the commencement of the intended renewed term) taken by the committee for building Blackfriars' bridge, in which case there would be an insuperable difficulty in applying the execution of the covenants to be contained in the lease to property so entirely altered. (*r*) In case of an agreement of *purchase* we have seen, (*s*) that from the time of signing the agreement the buildings and property are at the risk of the purchaser, who in-

(*i*) *De Minckwitz* v. *Udney*, 16 Ves. 467; *Boardman* v. *Moystyn*, 6 Ves. 467.

(*k*) *Buckland* v. *Hall*, 8 Ves. 92.

(*l*) *Gorton* v. *Smart*, 1 Sim. & S. 66.

(*m*) *Williams* v. *Cheney*, 3 Ves. 59; 1 Mad. Ch. Pr. 421.

(*n*) Id. ibid.; *Craven* v. *Fickell*, 1 Ves. J. 60; *Jones* v. *Jones*, 12 Ves. 188; 1 Mad. Ch. Pr. 421

(*o*) *Per* Lord Eldon, *Hill* v. *Barclay*, 18 Ves. 63; *Gourlay* v. *Somerset*, 1 Ves. & B. 68; 19 Ves. 429, S. C.

(*p*) *Wetherall* v. *Geering*, 12 Ves. 504.

(*q*) *Lovat* v. *Lord Ranelagh*, 3 Ves. & B. 24.

(*r*) *London* v. *Mitford*, 14 Ves. 58; *White* v. *Mott*, 1 P. W. 61.

(*s*) *Ante*, 296, n. (*q*).

stantly becomes the *equitable owner*, and entitled to all benefits and must bear all loss; (t) and he should therefore immediately insure against loss by fire, and provide against all other risks, for the vendor may compel him to complete the purchase and pay the entire purchase money, notwithstanding the entire destruction of the buildings by fire; (u) though if the *title-deeds* should afterwards be destroyed, even after they had been examined with the abstract, that circumstance *may* constitute a sufficient objection for the purchaser, and the Court of Chancery might not only dismiss the vendor's bill against him for specific performance, with costs, but also order a return of the deposit. (v) So if a church lease for two lives be sold, and after the preliminary agreement, and before conveyance, one of the lives should drop, the purchaser must bear the loss or extra fine. (x) So where the vendor agreed to convey a house, in consideration of an annuity during his life, and he died before conveyance or payment, a conveyance by the heir was decreed. (y)

But with respect to *tenants* and *agreements* for a lease, a different rule prevails; and although a lease have been executed, and afterwards the premises be consumed by fire, unless it be provided otherwise, the tenant continues liable to pay rent and perform the covenants, and could not obtain relief in equity; (z) nor could he even compel the landlord to expend the money insured in rebuilding; (a) yet if the tenancy be only in *fieri*, then if the premises be materially injured by fire, or otherwise deteriorated, without fault of the intended lessee, a Court of Equity will not compel him to accept a lease, or execute a counterpart, for a tenant, previous to an *actual* lease, is not considered to be a purchaser, or to have an equitable estate for the intended term. (b) It has been held, that if the intended lessor be in arrear to the ground landlord for rent upon a prior lease, that is an adequate excuse for refusing to complete an agreement under which a party was about to take possession. (c)

(t) *White* v. *Nutt*, 1 P. W. 61.

(u) *Paine* v. *Meller*, 6 Ves. 349; *Bryant* v. *Bush*, 4 Russ. Rep. 1; 1 Fonbl. Eq. 374; Sug. V. & P. 254, 255; *Study* v. *Saunders*, 5 Bar. & Cres. 628; and see further cases, *Cass* v. *Rudall*, 2 Vern. 280; *White* v. *Nutt*, 1 P. W. 61; *Stent* v. *Bayliss*, 2 P. W. 220; *Pope* v. *Roots*, 7 Bro. P. C. 184; *Mortimer* v. *Capper*, 1 Bro. C. C. 156.

(v) *Bryant* v. *Bush*, 4 Russ. R. 1.

(x) *White* v. *Nutt*, 1 P. W. 61.

(y) *Jackson* v. *Lever*, 3 Bro, C. C. 605; *semble*, overruling *Pope* v. *Roots*, 1 Bro. P. C. 376; 7 Id. 184, S. C.

(z) *Holtzapffel* v. *Baker*, 18 Ves. 115.

(a) *Leeds* v. *Cheetham*, 1 Sim. 146.

(b) *Semble*, *Phillipson* v. *Leigh*, 1 Esp. Rep. 398; see also *Edwards* v. *Etherington*, Ry. & Moody, 268; 7 Dowl. & Ry. 117, S. C.; *Collins* v. *Barrow*, 2 Mood. & M. 112; *Salisbury* v. *Marshall*, 4 Car. & Pa. 65; *Baker* v. *Holtzapffell*, 4 Taunt. 45; see 18 Ves. 115, S. C.

(c) *Partridge* v. *Sowerby*, 3 Bos. & P. 172.

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Laches as to Time when an objection. (*d*)

In general, *gross delay*, in applying for a specific performance, would induce the court to refuse its interference. (*e*) But when time was not of the essence of the contract, delay in applying for performance will not necessarily constitute an objection to a specific performance; (*f*) and even fourteen months' silence on the part of a purchaser is not an absolute bar, especially if he has not applied to the auctioneer to get back deposit. (*g*) As respects the delivery of a perfect abstract, delay will not excuse the purchaser from specific performance unless time were of the essence of the contract, but such delay may affect the amount of costs allowed upon decree of specific performance. (*h*)

Specific execution of agreements will sometimes be decreed though the time for the entire performance has elapsed, especially in cases of acquiescence in the delay, and where delay in performance was not incurred by any default in the party seeking relief; (*i*) as if on the sale of an estate it be strongly stipulated that the price shall be paid by a certain day, which elapses without payment, still the contract may be enforced, for the general rule is in equity not to consider the time as of the essence of agreement. (*k*) But this doctrine we have seen is not to be extended; (*l*) and in a late case it was laid down, that time is material where the subject of the contract is of such a nature as to be exposed to a daily variation in its value, as public stock, (*m*) or the trade of a public house. (*n*) So where the subject of the contract being a life annuity, time in the completion of the bargain may be of the essence of the contract; (*o*) though if the delay be occasioned by the other party, then he cannot take advantage of it; (*p*) and a contract for the sale of an estate for life for an annuity will be executed, although the vendor died before the end of the first half year. (*q*) So if in an agreement by a tenant at will of a public house for the

(*d*) *Ante*, 786, n. (*q*); see in general 1 Mad. Ch. Pr. 416 to 421; Newl. Contr. 227 to 256; Chit. Eq. Dig. Agreement, XII. page 62; and Id. Laches, 603.

(*e*) *Moore* v. *Blake*, 1 Ball & B. 69; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 604.

(*f*) *Hearne* v. *Tenant*, 13 Ves. 287.

(*g*) *Marquis of Hertford* v. *Boore*, 5 Ves. 719; *Pincke* v. *Curteis*, 4 Bro. C. C. 329; but not after fifteen years' delay, *Gill* v. *Fleming*, 1 Ridgw. P. C. 420; *Wingfield* v. *Whaley*, 1 Bro. C. C. 200.

(*h*) *Wilson* v. *Clapham*, 1 Jac. & W. 36; *Newall* v. *Smith*, Id. 263.

(*i*) *Penn* v. *Lord Baltimore*, 1 Ves. 450; 3 Woodes. 465.

(*k*) 3 Woodes. 465; and see *Hearne* v. *Tenant*, 13 Ves. 287.

(*l*) *Ante*, 120, 121; *Reynolds* v. *Nelson*, 6 Madd. R. 18.

(*m*) *Doloret* v. *Rothschild*, 1 Sim. & Stu. 598, 59.

(*n*) *Coslake* v. *Till*, 1 Russ. R. 376.

(*o*) *Withey* v. *Cottle*, 1 Turn. 78; but see *Coles* v. *Trecothick*, 9 Ves. 248; 1 Smith, 233, S. C.

(*p*) *Pritchard* v. *Ovey*, 1 Jac. & W. 396.

(*q*) *Jackson* v. *Lever*, 3 Bro. C. C. 605; *Coles* v. *Trecothick*, 9 Ves. 248; 1 Smith, 233, S. C.; *Kenney* v. *Wenham*, 6 Madd. 355; Sugd. V. & P. 8th ed. 262.

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sale of possession, trade, and good-will of the house at a fixed sum, and of the stock and furniture at a valuation, one of the terms be that possession should be given and taken, and the money paid on a named day, then time is of the essence of the contract, and a purchaser who was not in a condition to fulfil his part of the contract on that day cannot compel a specific performance, though he was on the following day to have proceeded to complete the purchase. (r) Where a lessor had long delayed to make out his title to grant a lease and give possession, specific performance of an agreement to take a lease for the purpose of *trade* was refused. (s) But we have seen that the omission of a party, who has long *possession* under an agreement to clothe himself with the legal title, will not in general constitute any objection to his enforcing the conveyance of the latter within any reasonable time during the term, (t) though if the party were not in possession, neither he nor the other party could obtain a decree of specific performance after great lapse of time. (u) So agreements are frequently considered to have been *abandoned* when neither party has taken any step for a considerable time; (x) as where a party contracted with another to work a colliery, but neglected to do so for several years, and his son then attempted to proceed and to enforce the agreement, but was refused. (y) So where a lease contained a covenant upon request to renew within three months before the expiration of the term, and the lessee neglected to apply for a renewal till within a month of the expiration of the term, and in the mean time the lessor had agreed to demise to a third party, the court held that the lessee was too late in his application. (z) And where a lease for three lives contained a covenant to renew upon the death of one life, and the lessee neglected to require a renewal until after two of the lives had dropped, although he offered to pay the fines for both the lives, specific performance was refused. (a) But where a tenant has been suffered to hold under an agreement for a lease, equity will not, after the expiration of the term, compel the tenant to execute the counterpart of a lease, merely to give the lessor a better remedy by action of covenant, especially if the

(r) *Coslake* v. *Till*, 1 Russ. 376.

(s) *Parker* v. *Frith*, 1 Sim. & Stu. 199.

(t) *Ante*, 786; *Crofton* v. *Ormsby*, 2 Sch. & Lef. 604; *Lord Kensington* v. *Phillips*, *Nesbitt* v. *Meyer*, 1 Swanst. 223.

(u) *Selon* v. *Slade*, 7 Ves. 265; *Alley* v. *Deschamps*, 13 Ves. 228.

(x) *Guest* v. *Homfrey*, 5 Ves. 818; *Lloyd* v. *Collet*, 4 Bro. C. C. 469.

(y) *Crofton* v. *Ormsby*, 2 Scho. & Lef. 604.

(z) Cited in *London* v. *Mitford*, 14 Ves. 58; 1 Fonbl. Eq. 432.

(a) *Bayley* v. *Leominster*, 1 Ves. J. 476; 3 Bro. C. C. 529, S. C.; and see 1 Fonbl. Eq. 433; and see *Herlity* v. *Hedger*, 1 Sch. & L. 123; but see *Lord Kensington* v. *Phillips*, 5 Dow, 61.

breach would probably only entitle him to nominal damages. (*b*)

In cases where the term would shortly expire, the court will on application advance the hearing of the bill for specific performance when the justice of the case requires. (*c*) The general rule is, that when time is not of the substance of a contract, specific performance will be decreed, though the period for its completion has elapsed. (*d*) This might on first view seem useless, but in many cases it would be otherwise; as suppose an agreement between a landlord and an intended lessee, *and his surety for the latter*, to execute a lease and counterpart, the execution might be material, even after the expiration of the proposed term, in order to give the lessor specific remedies at law by action of covenant; (*e*) and specific performance will be enforced where the lapse of time has been trifling, or the result of fraud. (*f*) But where a lessor, who applied for specific performance of an agreement for a lease of iron and coal mines, neglected to do so for forty-two years, it was held that the circumstance of his estate being encumbered with mortgages, and the difficulty of obtaining their essential concurrence, was no adequate excuse for the delay; (*g*) and delay for two years, and until after the intended lessee had given notice of his intention to abandon the contract on account of the lessor's neglect to make stipulated alterations and improvements, was held inexcusable. (*h*) And even an infant cannot excuse delay in applying for a lease for twenty years, when there was a stipulation to lay out a certain sum within the first three years of the term. (*i*)

II. PARTICULAR CONTRACTS WHEN SPECIFICALLY ENFORCED. (*j*)

II. Having thus considered the *general rules* when or not a Court of Equity will decree a specific performance of contracts, it may be of practical utility to state the principal instances when or not *particular* contracts will be enforced as they relate to, 1st, The Person,—2dly, Personal Property,—and, 3dly, Real Property. We have necessarily, in stating the *general* rules, had occasion to examine many of these, and to which reference must be had. (*k*)

(*b*) *Nesbitt* v. *Meyer*, 1 Swanst. 223.
(*c*) *Hoyle* v. *Livesey*, 1 Meriv. 381.
(*d*) *Jessop* v. *King*, 2 Ball & B. 94.
(*e*) But see *Bridger* v. *Nesbit*, 1 Swanst. 223, 226.
(*f*) *Savage* v. *Brocksopp*, 18 Ves. 335; see cases of fraud and other excuse, *Blackwell* v. *Nash*, 1 Stra. 535; *Hotham* v. *East India Company*, 1 T. R. 638; 1 Fonbl. Eq. 391.
(*g*) *Pinker* v. *Frith*, cited in *Wright* v. *Howard*, 1 Sim. & Stu. 199.
(*h*) *Heaphy* v. *Hill*, 1 Sim. & Stu. 29.
(*i*) *Griffin* v. *Griffin*, 1 Sch. & L. 352.
(*j*) See division of subject, *ante*, 825.
(*k*) *Ante*, 825 to 849.

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1. Relating to the *Person*, or of a *mixed* nature, as in case of marriage articles, partnerships, &c.

1. We have seen that suits to compel the specific performance of a contract to marry have been expressly prohibited; (*l*) but specific performance of marriage articles, and all contracts of that nature, although relating only to the payment of money, will be specifically enforced in Courts of Equity, where the most adequate justice in those cases can be best secured. (*m*) So, though in general *suits* for *formally annulling* a marriage are exclusively cognizable in the Spiritual Courts, yet there are cases in which equity will decree and enforce the payment of alimony to a wife, though she have had a sentence for it in a Spiritual Court. (*n*) The adultery of the wife is no bar to a bill for specific performance of articles previous to the marriage. (*o*)

Partnerships.

A clear and distinct contract to enter into a *Partnership* in a trade or other concern for a certain term of years, will be specifically enforced, though in truth it is a mere chattel interest. (*p*) But if by the terms of the agreement the partnership, if it were actually commenced, would have no fixed duration or benefit, as if it be stipulated or understood that either party might put an end to it upon giving notice, there the court would not absurdly interfere to decree a partnership that might immediately afterwards be legally determined, (*q*) and the party would be left to his remedy at law to recover damages, if any, for the nonperformance of the agreement. (*r*) On the other hand, when, in consequence of the fraud or misconduct of one of several partners, the joint trade cannot be any longer carried on without hazard, the court will enforce dissolution by injunction and decree. (*s*) So the specific performance of an agreement made at the *dissolution* of a partnership that a particular book used in the trade should be considered the exclusive property of one of the partners, and that a copy of it should be delivered to the other, will be decreed, for in such case, as at law such partner was legally entitled to the book,

(*l*) *Ante*, 56, 57; 4 Geo. 4, c. 76, s. 27.

(*m*) *Haymer* v. *Haymer*, [illegible] Ventr. 343; *Jenkins* v. *Keymis*, 1 Lev. [illegible]50, 237, S. C.; *Green* v. *Pigot*, 1 [illegible] Ch. Cas. 103; *Mortimer* v. *Capper*, Id. 158; Chit. Eq. Dig. head Settlement, [illegible]. VIII., and tit. Covenant; 3 Wo[illegible]des, V. L. 474.

(*n*) *Angier* v. *Angier*, Pr. Ch. 496; Gilb. Eq. Rep. 1[illegible]2, S. C.

(*o*) *Buchanan* v. *Buchanan*, 1 Ball & B. 203; 1 Mad. Ch. Pr. 421.

(*p*) *Per* Lord Hardwicke in *Beaton* v. *Liston*, 3 Atk. 385; *Anon.* 2 Ves. S. 629; *Peacock* v. *Peacock*, 16 Ves. 49; Newl. Contr. 92; and particularly 1 Mad. Ch. Pr. 411, note (*x*), observing upon the case of *Hercy* v. *Birch*.

(*q*) *Hercy* v. *Birch*, 9 Ves. 357; and see observations in *Agar* v. *Macklew*, 2 Sim. & Stu. 422.

(*r*) *Morson* v. *Saunders*, 1 Brod. & Bing. 318; *Street* v. *Brown*, 1 Marsh. Rep. 610; *Gale* v. *Leckie*, 2 Stark. Rep. 108. If nothing expressed, the implied contract is for an equal division of profits, *Peacock* v. *Peacock*, 16 Ves. J. 49.

(*s*) *Loscombe* v. *Russell*, 1 Clarke & Fin. 8; *ante*, 705, 706; and see cases in Chitty on Bills, 8 ed. 61, n. (*f*).

the specific delivery thereof could not have been enforced by replevin or action of detinue;(t) for the principle upon which a Court of Equity interferes to enforce contracts is, that the *particular act prayed* cannot be enforced in a Court of Law, which has no means of compelling the defendant to permit the copy to be completed, or to permit, in the interim, the inspection of the book by the plaintiff. And although in general a bill for an account against a partner should pray a dissolution, (u) yet the Court of Chancery will entertain a bill to compel specific and *continued* performance by partners, and compel them to *continue* to act according to the provisions of instruments into which they have entered, when it is essential for the interests of the parties concerned that such partnership should continue; and where the court will so interfere it will take care, by injunction and otherwise, to secure that the decree shall not be defeated by any thing done in the mean time. (x)

With respect to contracts connected with *mental labours* and pursuits, a Court of Equity will not decree specific performance of an agreement to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual for a stipulated remuneration; (y) though that court will by injunction restrain an author from publishing contrary to his express covenant any other work in prejudice of that the copyright of which he had sold to the covenantee. (z)

Not an agreement to refer.

Equity will not decree specific performance of the most express agreement to *refer to arbitration* (a) or to abide by the decision of a *third person*, (b) unless before revocation a perfect award or decision has been made; (c) and indeed upon one occasion, where a party had covenanted to refer, it was held that no action can be sustained for refusing to nominate an arbitrator, (d) and as either party might, after the appointment, and even upon the eve of making the award, revoke or countermand the authority of the arbitrator (subject to an express rule

(t) *Lingen* v. *Simpson*, 1 Sim. & Stu. 600.

(u) *Loscombe* v. *Russell*, 1 Clark & Fin. 8.

(x) *Const* v. *Harris*, 1 Turn. & Russ. 496, 529, where the extent of jurisdiction in equity as to partners was fully discussed.

(y) *Clarke* v. *Priec*, 2 Wils. Ch. R. 157.

(z) *Barfield* v. *Nicholson*, 2 Sim. & Stu. 1; but see 2 Wils. Ch. R. 157.

(a) *Agar* v. *Macklew*, 2 Sim. & Stu. 418; *Booth* v. *Jackson*, 6 Ves. 815, 818; *Milnes* v. *Carey*, 14 Ves. 270; *Street* v. *Rigby*, id.; *Gourlay* v. *Somerset*, 19 Ves. 431, 1 Wils. Ch. Pr. [illegible]; *Wellington* v. *Mackintosh*, 3 Atk. 569; *Tattersal* v. *Groote*, 2 Bos. & P. 135; Sug. V. & P. 8 ed. 253, 254; 1 Mad. Ch. Pr. 404; Redesd. Tr. Pl. 214.

(b) *Blundell* v. *Brettargh*, 17 Ves. 241; and see as to *valuations*, *ante*, 828 to 831; 1 Mad. Ch. Pr. 426.

(c) *Ante*, 830.

(d) *Tattersal* v. *Groote*, 2 Bos. & Pul. 135; but see *Mitchell* v. *Harris*, 2 Ves. J. 129.

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of court to the contrary), it is obvious that it would be as futile to decree a reference and appointment of arbitrators as it would be to decree a partnership determinable at pleasure. (*d*) However, an agreement to make the submission to reference a rule of court, under the statute 9 & 10 W. 3, c. 15, may be made an order of a Court of Equity, and the Court of Chancery will in that case compel, by proceeding *in personam*, (viz. by attachment,) the specific performance of the award made in pursuance of such a submission, provided the authority of the arbitrator were not revoked before the award was made; (*e*) or even if it were revoked, yet if the submission and order expressly prohibited such revocation. (*e*) And a bill lies to compel specific performance of an award when the act to be performed is collateral to the payment of money, or where the party has received the money, in consideration whereof he was awarded to convey. (*f*) In one case a specific performance of an agreement to grant *a lease* was decreed, rejecting a stipulation that a third person should decide upon the terms, the agency of such third party not being of the essence of the contract. (*g*) But where one of the terms of a contract of *purchase* was, that the purchaser's counsel should approve of the title, and he did not, a bill for specific performance against him was dismissed with costs. (*h*) The practice is stated to be, that if one party perform his part of an award, the Court of Chancery may compel the other party to perform his, though the award was not made originally by the direction of that court, (*i*) and that it is clear that a bill will lie for the specific performance of an award; (*k*) and this, although the award be unreasonable, because the arbitrator was a judge of the party's own choosing, and the award is considered as ascertaining the terms of a previous agreement. But although if the award direct any thing to be done respecting *lands*, the court will decree a specific performance, it will not execute an award for the mere payment of money. (*l*)

Secondly, Contracts relating to Personal Property.

It has been supposed, though incorrectly, to be a general rule, that *contracts* relating to the *sale* of *Personal Property* will not be specifically *enforced*, and that the party, whether vendor or

(*d*) *Ante*, 850, (*q*).
(*e*) *Hall* v. *Hurdy*, 3 P. W. 187; *Spettigue* v. *Carpenter*, Id. 362; 2 Vern. 444; Com. Dig. Chancery, 2 K. 2; *Nichols* v. *Chalie*, 14 Ves. 265.
(*f*) *Hall* v. *Hardy*, 3 P. W. 187, 190, 1 Mad. Ch. Pr. 426.
(*g*) *Gourlay* v. *Somerset*, 19 Ves. 429, *ante*, 851, note (*g*).
(*h*) *Williams* v. *Edwards*, 2 Simons, 78, and see *ante*, 829.
(*i*) *Bishop* v. *Bishop*, 1 Chan. Rep. 142; *Marquis of Ormond* v. *Kynnersley*, 2 Sim. & Stu. 15.
(*k*) *Wood* v. *Griffiths*, 1 Swanst. 43; 1 Wils. Ch. C. 44, S. C.
(*l*) 1 Madd. Ch. Pr. 401, *sed quære* as to the generality of the latter exception.

purchaser, will be left to his remedy at law for the recovery of damages; (m) but that doctrine (the application of which will presently be fully considered,) is by no means so general, and there is no general rule distinguishing contracts relating to *personalty* from those respecting *realty*; and it *now seems to be established that where the breach of any contract would occasion irreparable mischief, such breach, if affirmative, may be prevented by injunction, and if negative, by bill and decree of specific performance*; (n) and it should further seem, that although where the damages which a party might be able to recover at law must necessarily, from the nature of the case, be commensurate to the injury sustained, a Court of Equity will not interfere; (o) yet specific execution of agreements will be decreed where damages would not answer the intention of the party making the contract, and a specific performance is therefore essential to justice. (p) The true rule has recently been stated and explained by the Vice-Chancellor in *Adderley* v. *Dixon*, (q) in which specific performance, by payment of a stipulated price, was decreed in a bill filed by the vendor of debts proved under a commission of bankruptcy, and the Vice-Chancellor observed, "Courts of Equity decree the specific performance of contracts, not upon any distinction between Realty and Personalty, but *because damages at law may not in the particular case afford a complete remedy*. Thus a Court of Equity decrees performance of a contract for land, not because of the *real* nature of the *land*, but because damages at law, which must be calculated upon the general money-value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a Court of Equity will not generally decree performance of a contract for the sale of *Stock or Goods*, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods. In *Taylor* v. *Neville*, (r) specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the

The general principle and rule when specific performance of a contract relating to personalty will be enforced.

(m) See cases *ante*, 711, 712; Newl. Cont. 90, 91.

(n) *Semble*, *Weale* v. *West Middlesex Waterworks Company*, 1 Jac. & W. 370.

(o) *Harnett* v. *Yielding*, 2 Sch. & Lef. 533.

(p) *Davis* v. *Howe*, Id. 341.

(q) *Adderley* v. *Dixon*, 1 Sim. & Stu. 607; and see *Withy* v. *Cottle*, Id. 174; 1 Turn. & Russ. 78, S. C.; *Wright* v. *Bell*, 5 Price, 325; Dan. 95, S. C.

(r) *Taylor* v. *Neville*, cited in *Buxton* v. *Lister*, 3 Atk. 383.

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reason given by Lord Hardwicke was, that such sort of contracts differ from those that are immediately to be executed. And they do differ in this respect, that the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In *Ball* v. *Coggs*, (s) specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture, and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted at a conjectural price. In Buxton *v.* Lister, Lord Hardwicke puts the case of a ship carpenter purchasing timber, which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber, contracting to sell his timber in order to clear his land; and assumes that as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance. The Vice Chancellor then said, "The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of Ball *v.* Coggs, and Taylor *v.* Neville, a Court of Equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends, and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price. It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has however been settled by repeated decisions, that the remedy in equity *must be mutual;* and that where a bill will lie for the purchaser, it will also lie for the vendor." (*t*) So it has been laid down as a general rule that specific execution of agreements will be *decreed* when damages would not answer the intention

(*s*) *Ball* v. *Coggs*, 1 Bro. P. C. 140.
(*t*) *Per* Vice-Chancellor in *Adderley* v. *Dixon*, 1 Sim. & Stu. 607.

in making the contract, and a specific performance is therefore essential to justice; and that on the other hand equity will not decree specific performance of a covenant, where from circumstances it has become unconscientious strictly to enforce the specific performance, but on the terms of the plaintiff's submitting to a conscientious modification, especially where the conduct of both parties for a great length of time has caused the covenant to be so acted upon as to make it unconscionable to refuse a specific performance.(t) So in the case of partners, before noticed, where the taking a copy of a partnership book was decreed, we may remember the principle there stated by the Vice-Chancellor, upon which a Court of Equity interferes to enforce contracts, viz. that the particular relief prayed cannot be had in a court of law.(u)

We have seen that a Court of Equity will secure and decree the delivery of *particular* kind of chattels, as *heir-looms, family pictures, title deeds, specific bequests* or other property, in which a claimant may have a particular interest; (x) for in an action of trover damages only could be obtained, and not the deeds themselves; and though detinue would restore the deeds themselves, yet a bill in equity, with an immediate injunction pending the suit securing them, and an ultimate decree for their specific delivery, would obviously be a more perfect remedy. (y) And Chancery will decree a specific chattel to be delivered up without measuring the value, when from its nature there can be no compensation by damages. (z) But in an application to the court to stay the disposal of personalty, a specific right to the property must be shown, as well as the danger of loss. (a)

Contracts strictly of indemnity.

So the specific performance of a covenant to *indemnify* may be decreed, though it sounds only in damages, upon the principle on which bills *quia timet* are entertained; (b) but this is not to be extended to a contract to pay an annuity not secured otherwise than by personal contract, so as to compel the party, who has engaged to pay, to give any collateral security for prospective payments, and to recover which, the party entitled must therefore proceed only at law. (c)

(t) *Davis* v. *Hone*, 2 Scho. & Lef. 341; *Wilby* v. *Cottle*, 1 Sim. & Stu. 174; 1 Turn. & Russ. 78, S. C.

(u) *Lingen* v. *Simpson*, 1 Sim. & Stu. 603, *ante*, 850, 851.

(x) *Ante*, 812, 813, and *Macclesfield* v. *Davis*, 3 Ves. & B. 16.

(y) *Jackson* v. *Butler*, 2 Atk. 306; 1 Mad. Ch. Pr. 228.

(z) *Fells* v. *Read*, 3 Ves. 70.

(a) *Zamines* v. *Franco*, Dick. 149.

(b) *Ranelaugh* v. *Hayes*, 1 Vern. 189; *Pember* v. *Mathers*, 1 Bro. C. C. 52.

(c) *Brough* v. *Oddey*, 1 Russ. & M. 55, 58.

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Contract for purchase of goods.

In general a mere contract for the sale and delivery of any kind of *goods*, the usual and daily subjects of purchases and sales, and which might be readily and as conveniently obtained elsewhere, will not be specifically enforced, because the recovery at law of damages for not accepting or not delivering would in general be adequate compensation; (*d*) but there are exceptions to that rule, as when the non-delivery would be productive of serious loss, or where the purchaser has paid the price, and is justly entitled to the specific delivery. (*e*) Thus we have seen that a contract for the purchase of a large quantity of timber standing or lying in a particular place; (*f*) so an agreement for the purchase of an *annuity* payable out of the dividends of stock; (*g*) though not to enforce payment of the arrears of an annuity, the remedy being properly at law, (*h*) or for the purchase of debts. (*i*) So where property in a cargo had been transferred by a bill of sale signed by the vendor and vendee, but by a new agreement, signed by them before they parted, it was stipulated, that it should be sold and accounted for by the factor for the vendor, this being reduced to agreement, it was held that the remedy was in equity. (*k*) So where the vendor of a share of a ship had executed a bill of sale and signed receipt for the purchase money, without its being in fact paid, a Court of Equity will give relief as well as discovery and decree specific payment. (*l*)

Stock in the funds.

With respect to a purchase of *stock in the funds*, the decisions have been contradictory, and one of the cases turned upon the question whether stock was goods and chattels within the statute of frauds. (*m*) In one of the last cases it was considered to be perfectly settled that equity will not enforce the specific performance of an agreement for a transfer of stock. (*n*) But it has been recently decided that a bill may be sustained for the specific performance of a contract for the sale of the stock of a foreign government (the Neapolitan stock), the bill praying the specific delivery of certificates relating to such

(*d*) *Ante*, 711, 712; *Dorson* v. *Westbrook*, 5 Vin. Ab. 510, pl. 22 & 538; and see observations on that case in *Doloret* v. *Rothschild*, 1 Sim. & Stu. 598.

(*e*) *Ante*, 712, notes, (*t*) & (*a*), and 853, 854.

(*f*) *Ante*, 712, n. (*t*); and see *Clavering* v. *Clavering*, Mos. 224; Chit. Eq. Dig. 62.

(*g*) *Withy* v. *Cottle*, 1 Sim. & Stu. 174; *Jackson* v. *Lever*, 3 Bro. C. C. 605; *Kenney* v. *Wexham*, 6 Madd. R. 253.

(*h*) *Brough* v. *Oddey*, 1 Russ. & M. 58.

(*i*) *Adderly* v. *Dixon*, 1 Sim. & Stu. 608; but see *ante*, 853, 854; *Wright* v. *Bell*, 5 Price, R. 325.

(*k*) *Weymouth* v. *Boyer*, 1 Ves. 416.

(*l*) *Ryle* v. *Haggie*, 1 Jac. & W. 234, 240.

(*m*) *Colt* v. *Netterville*, 2 P. W. 304; where the judges were equally divided on that point, Id. 308.

(*n*) *Nutbrown* v. *Thornton*, 10 Ves. 161; *Cud* v. *Butter*, 1 P. W. 570; *Gardener* v. *Pullen*, 2 Vern. 394; *Mason* v. *Armitage*, 13 Ves. 37; Newl. Contr. 90, 91; but see *Colt* v. *Netterville*, 2 P. W. 304, 308.

stock, and which give the *legal title* thereto, and the Vice-Chancellor was of opinion that inasmuch as that bill prayed a *delivery of the certificates*, which would constitute the plaintiff the proprietor of a certain quantity of stock, the bill in equity would hold, because a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party; and the Vice-Chancellor declared that he also considered that the plaintiff, not being the original holder of scrip, but merely the bearer, might not be able to maintain any action at law upon the contract, and that if he had any title it must be in equity. (*o*) It will be observed that the principle of this decision, and of the decisions respecting injunctions, (*p*) will propably justly lead to an extension of the remedy, by enforcing the specific performance of many personal contracts, where the chattel itself might, by proceedings in equity, be secured and delivered to a purchaser, in cases where the vendor may have received part of the purchase money and probably be insolvent. (*p*)

Sales of debts or choses in action.

Contracts for the purchase and assignment of a *chose in action* and delivery of the security may be enforced specifically in equity. (*q*) So on the behalf of a vendor, specific performance of a contract for the sale of *debts* proved under a commission of bankruptcy, but the amount of the dividends upon which had not been declared, was enforced, viz. by a decree of payment of the agreed price. (*r*) And an agreement to divide equally whatever should come to either of two or more parties by the will of a third party will be specifically enforced, (*s*) and even a contract to *bequeath by will*, when founded on consideration, will be *subtantially* enforced. (*t*)

A contract to *grant an annuity* may be specifically decreed, (*u*) as in favour of a female, whom the covenantor had

(*o*) *Doloret* v. *Rothschild*, 1 Sim. & Stu. 598, A. D. 1824; and see *Colt* v. *Neterville*, 2 P. W. 304. And suppose a vendor of an estate has sold and conveyed the same for £20,000, to be paid by a transfer of stock standing in purchaser's name at a future day, and before that day the purchaser has resold the estate and pocketed the money, and has become insolvent, and about to quit the kingdom, ought not a Court of Equity on bill filed, immediately by injunction to secure the stock, and afterwards decree a specific transfer, &c.?

(*p*) *Ante*, 711 to 714; *Pouncett* v. *Humphrey*, Id. 712, n. (T); *Smith* v. *Fromont*, 2 Swanst. 332, 713; *ante*, 853, 854.

(*q*) Newl. Cont. 100, but not for the reason there assigned, that there is no remedy at law, because it is clear there is; *Wright* v. *Bell*, Dan. 95; 5 Price's R. 325, S. C.

(*r*) *Adderley* v. *Dixon*, 1 Sim. & Stu. 607; *ante*, 853, 854.

(*s*) *Beckley* v. *Newland*, 2 P. W. 181; *Wethered* v. *Wethered*, 2 Simons, 183; *Harwood* v. *Tooke*, Ib. 192.

(*t*) *Goilmere* v. *Bathsop*, 1 Vern. 48; *Dufour* v. *Ferara*, cited 3 Ves. 412, 416; *Walpole* v. *Lord Orford*, 3 Ves. 402.

(*u*) *Weild* v. *Smith*, 14 Ves. 491; *Ball* v. *Coggs*, 1 Bro. P. C. 146, cited in *Adderley* v. *Dixon*, 1 Sim. & Stu. 610; *Coles* v. *Trecothick*, 9 Ves. 248; *Withy* v. *Cottle*, 1 Sim. & Stu. 174; *Kenney* v. *Wexham*, 6 Madd. R. 255, but see *ante*, 855, n. (*c*).

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previously seduced. (*x*) But if the annuity has been already granted, a bill cannot be filed to compel a better prospective security unless agreed to be given, but the party beneficially entitled will be left to the legal remedy for the arrears as they become due. (*y*)

Personal contracts to pay money.

No suit in equity is, *in general*, sustainable (excepting in cases of *trusts*) to compel the *specific payment of a sum certain*, or a penalty secured by specialty or other contract, but the remedy is in general only at law. (*z*) But we have just seen that specific performance by payment may be enforced on a contract to purchase debts. (*a*) And where a party beneficially interested had entered into a written contract, in the name of a *third* person, although without his knowledge, to sell certain articles to the defendant, and who afterwards refused to pay, and the third person would not allow his name to be used as a plaintiff at law, a bill was sustained against the third person and the defendant, to compel the latter to *pay* the price. (*b*) So where a son promised to pay his father's legacies if he would forbear to alter his will, such promise would be enforced in equity. (*c*)

Good-will of a trade, &c.

Specific performance will be decreed of an agreement to sell the *good-will* of a trade, when accompanied with the exclusive use of a secret therein; (*d*) and a contract for the sale of the *lease* of a public-house and the good-will of the trade, licenses, household furniture and stock in trade at a valuation, and which had been made, was also decreed. (*e*) But it has been consi-

(*x*) *Annandale* v. *Harris*, 2 P. W. 432; 1 Bro. P. C. 250.

(*y*) *Brough* v. *Oddy*, 1 Russ. & M. 55, 58; *ante*, 855, (*c*).

(*z*) *Hollis* v. *Carr*, 3 Swan. Rep. 641.

(*a*) *Adderley* v. *Dixon*, 1 Sim. & Stu. 607; *ante*, 853, 854; *Wright* v. *Bell*, 5 Price, 325; Dan. 95, S. C.

(*b*) *Fellowes* v. *Lord Gwyder*, 1 Sim. R. 63; and see *Ryle* v. *Haggie*, 1 Jac. & W. 234, as to decrees for *payment*.

(*c*) *Chamberlain* v. *Chamberlain*, 2 Freem. 34.

(*d*) *Bryson* v. *Whitehead*, 1 Sim. & Stu. 74; and see *Williams* v. *Williams*, 2 Swans. 253; see other cases, Chit. Eq. Dig. tit. Good-will, 479; and id. Trade, 1284.

(*e*) *Dakin* v. *Cope*, 2 Russ. R. 170. By an agreement entered into with executors for the purchase of a leasehold public-house and the good-will and licenses connected with it, the household furniture, stock in trade and other effects upon the premises, were to be taken by the purchaser at a valuation, and possession was to be delivered up to him on the 29th of September, 1821. The valuation was made, but on the 29th of September, the purchaser alleging that there was a defect in the title to the leasehold, refused to perform his contract, the executors filed a bill for specific performance, but in the mean time remained in possession of the house and carried on the business; and it was held, that though the executors were entitled to a decree for specific performance, and though the purchaser had done wrong in refusing to perform the contract, he could not be made answerable for the trade which had been carried on in the premises since September, 1821; that he could not be compelled to take that portion of the stock in trade on the premises at the time of the decree which was not there at the date of the agreement, but had been substituted for such parts of the old stock as had been consumed in the usual course of the business; that the purchaser ought to be charged with rent, taxes and other out-goings paid by the executors since September, 1821, and with interest on the sums so paid by them; that the purchaser was not entitled to any

dered that a sale of a good-will *merely* without some *real property* could not be enforced in equity; (*f*) and it seems to have been doubted whether when good-will forms the *principal* part of a contract, performance would be decreed, but there was no decision upon that point, the bill having been dismissed on the ground that the purchaser was not ready to pay on the precise day, which in that case was material. (*g*) And contracts of this nature will not, it is said, be enforced without great caution and consideration; (*h*) and a contract to assign the fees of a gaoler together with the profits of a tap-house will not be specifically enforced; (*i*) nor an agreement to purchase the business of an attorney. (*k*)

Compelling the executing and delivery of securities. (*l*)

We have seen that where a party has *agreed*, though verbally, to give a valid security, and by mistake an insufficient security has been executed, invalid at common law, or varying from the intended terms, or invalid in respect of the insufficiency of the stamp, a Court of Equity will compel the execution and delivery of a proper security, according to the original intention of the parties. (*m*) Thus where *A.* agreed to be bound in a bond as surety for *B.*, and signed and sealed the same accordingly; but by the neglect of the clerk *A.*'s name was not inserted, and afterwards the obligee showed the condition and *A.*'s name and seal, and demanded payment of *A.*, and threatened to sue him unless he would give fresh security, which *A.* agreed to do, but afterwards finding the mistake, refused, not being bound by law, a Court of Equity compelled him to give such security. (*n*) So where a scrivener negligently omitted to examine the title of a vendor, and in consequence his client, the purchaser, took a bad title, and thereupon the scrivener agreed to make him satisfaction another way, but afterwards refused, upon bill filed specific performance was decreed. (*o*) And where a vendor retains the title-deeds, and has covenanted for further assurance

occupation rent or other allowance for the use of the house and furniture by the executors during the period that elapsed after the 29th of September, 1821.

(*f*) *Baxter* v. *Connolly*, 1 Jac. & W. 380; and see *Shackler* v. *Baker*, 14 Ves. 468; *Crutwell* v. *Lye*, 17 Ves. 335; *Metwold* v. *Walbank*, 2 Ves. 238.

(*g*) *Coslake* v. *Till*, 1 Russ. R. 376.

(*h*) *Supra*, note (*f*); *Mitchel* v. *Reynolds*, 1 P. W. 184; *Harrison* v. *Gardner*, 2 Mad. R. 198; *Davis* v. *Mason*, 5 T. R. 118. A contract for the transfer of the good-will of the business of an attorney is good at law, *Bunn* v. *Guy*, 4 East, 190; *Wyburd* v. *Stanton*, 4 Esp. R. 179.

(*i*) *Metwold* v. *Walbank*, 2 Ves. 238; 1 Bro. P. C. 234.

(*k*) *Bozon* v. *Farlow*, 1 Meriv. 459; 1 Mad. Ch. Pr. 404.

(*l*) *Ante*, 710, 711, improperly there inserted, but which should have been here introduced.

(*m*) *Ante*, 710, 711, where by mistake the rules and decisions were printed, instead of having been more properly introduced in this part.

(*n*) *Crosby* v. *Middleton*, Prec. Chan. 309; and see *Rawstone* v. *Parr*, 3 Russ. 424, 539, S. C.

(*o*) *King* v. *Withers*, Prec. Cha. 19.

only, the purchaser may, under that covenant, file a bill to compel him to enter into a covenant for production of the deeds. (*p*)

Equity will enforce a contract where the remedy at law would be *doubtful*.

Whenever the *legal* right of a purchaser to maintain an *action* for damages in respect of the breach of contract may be doubtful, it seems that sometimes a Court of Equity will on that account, without other reasons, decree specific performance; (*q*) as where the defendant had agreed to deliver certificates which constituted the legal title to stock; (*q*) and where by a memorandum the parties agreed to sell and purchase several large parcels of timber standing in a particular place, and the price of which was 3050*l.*, to be paid by instalments extending over six years, and the purchaser to be allowed eight years for disposing of the timber, and it was thereby further stipulated that formal articles and *covenants* should be forthwith drawn, Lord Hardwicke, thinking the remedy at law questionable, decreed specific performance. (*r*) So where partners have entered into a preliminary agreement stipulating for more formal articles, the execution of the latter will be decreed. (*s*)

Thirdly. Specific performance of contracts relating to *Realty*.

With respect to *Real Estates*, although in general all questions relating to them must be decided in the country where they are situate, yet a Court of Equity in England will enforce contracts and trusts relating to them, if the party required to perform the act be within the jurisdiction. (*t*) And we have seen that in equity, even an agreement for settling the boundaries of British plantations may be enforced, (*u*) and a question concerning the title to the Isle of Man may be collaterally determined in the Court of Chancery. (*v*)

Covenants or contracts to *repair*, *build* or *rebuild* a house or other erection, as they related to *realty*, were *formerly* specifically enforced. (*x*) But the more recent decisions appear to settle, that a suit for specific performance of any such covenant cannot now be sustained, and that the remedy is properly at law to recover damages, which the plaintiff may then expend in completing or repairing the stipulated buildings, and bills to compel specific performance of such covenants have been dis-

(*p*) *Fain* v. *Ayres*, 2 Sim. & Stu. 533.

(*q*) *Doloret* v. *Rothschild*, 1 Sim. & Stu. 598.

(*r*) *Burton* v. *Lester*, 3 Atk. 382; *Pember* v. *Mathers*, 1 Bro. C. C. 52; *Tayler* v. *Neville*, cited 3 Atk. 384; *per* Lord Hardwicke, *Buxton* v. *Lister*, 3 Atk. 385; Newl. Contr, 92.

(*s*) *Ante*, 850.

(*t*) *Elliot* v. *Lord Minto*, 6 Mod. 16; *Foster* v. *Vassall*, 3 Atk. 589; *Gardener* v. *Fell*, 1 Jac. & W. 27.

(*u*) *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 447, *ante*, 821.

(*v*) *Earl Derby* v. *Duke of Athol*, 1 Ves. Sen. 202.

(*x*) See Year Books, 8 Edw. 4, 46; 1 Mad. Ch. Pr. 361; but see Id. 403, 404.

missed with costs. (*y*) Nor, as we have seen, will specific performance of the *ordinary* covenants in a *lease* be enforced in equity, (*z*) and the court refused to decree specific performance of a covenant to make good a gravel pit, (*a*) though we have seen that when the breach of such a covenant would amount to *waste*, and be ruinous to the estate, such as pulling down buildings, or digging or ploughing up ancient meadows, contrary to express or implied covenants, such breaches by commission may be restrained by injunction. (*b*) Equity, however, will execute a covenant in a building lease, that the lessee's erections shall correspond with adjoining houses, pursuant to express covenant. (*c*) Perhaps it was partly on the ground of waste that a covenant by a lessee of alum works, to *leave* a *stock* of a certain amount upon the premises, that a decree *quia timet* was in one case made; and which was afterwards affirmed in the House of Lords. (*d*)

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An agreement to invest money in land, (*e*) and an agreement to settle boundaries, will be specifically enforced, because damages in an action would not in either case effect the object of the grantee. (*f*)

Contracts for a *Lease* or *Sale* of *Real* property.

Contracts for *demising* or *selling* estates are the most frequent subjects of bills for specific performance, and we have noticed, in considering the general rules, most of the cases when or when not performance will be decreed. (*g*) Where an ancestor, seised in fee, has, by a contract not under seal, (and consequently not at law binding his heir, nor subjecting him to any action at law,) agreed to demise or sell his estate, a bill against the heir to compel specific performance is the best, and unless the ancestor left personal assets, is the only remedy. (*h*) The sale of an estate under a decree is an exception, for the purchaser then cannot file a bill for specific performance, but must proceed under the decree. (*i*)

In a case of *sale* (except in the instances where the acceptance of compensation will be enforced) the vendor cannot sus-

(*y*) *Ante*, 714, n. (*l*); Newl. on Contr. 90 to 95; 3 Woodes. 464, note 2; 1 Mad. Ch. Pr. 404; *Lucas* v. *Comerford*, 3 Bro. C. C. 167; *Mosely* v. *Virgin*, 3 Ves. 184; *Pembroke* v. *Thorpe*, 3 Swanst. Rep. 437, where the cases on this subject are collected; and see observations in *Hodges* v. *Horsfall*, 1 Russ. & Myl. 124, 125; *Flint* v. *Brandon*, 8 Ves. 159.

(*z*) *Rayner* v. *Stone*, 2 Eden's Rep. 128; 1 Mad. Ch. Pr. 404.

(*a*) *Flint* v. *Brandon*, 8 Ves. 159.

(*b*) Id. ibid.; *ante*, 714, n. (*h*); and *ante*, 726, 727.

(*c*) *Franklyn* v. *Tuton*, 5 Mad. 469; and see Chit. Eq. Dig. Covenant to build.

(*d*) *Buckinghamshire* v. *Ward*, cited 3 Atk. 384; *Nutbrown* v. *Thornton*, 10 Ves. 162; Newl. Cont. 93; *sed quære*, see *Flint* v. *Brandon*, 8 Ves. 159.

(*e*) Newl. Cont. 74, 109.

(*f*) *Penn* v. *Lord Baltimore*, 1 Ves. 444.

(*g*) *Ante*, 820 to 849.

(*h*) 1 Mad. Ch. Pr. 362.

(*i*) *Annesley* v. *Ashurst*, 3 P. W. 282; 1 Mad. Ch. Pr. 404.

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tain a suit for specific performance, unless he be prepared to establish a complete title to the whole of the property agreed to be sold. Therefore where a vendor could only make out a title to convey six-sevenths of the estate sold, a specific performance was refused. (*j*) But having considered the numerous cases in which Courts of Equity will refuse specific performance, whether on account of the incompetency of the contracting parties, or of the insufficiency of the contract itself, or in respect of fraudulent misrepresentation or concealment, or other numerous circumstances, it would be an unnecessary repetition here to consider the various grounds when or not a contract for a lease or a sale will be enforced. (*k*)

How in practice specific performance is in effect decreed by granting an injunction.

We have also before suggested the necessity for referring to the practice relative to injunctions, when inquiring whether a specific performance of an act can be enforced. (*l*) Thus, though a Court of Equity will not order directly the repair of the banks of a canal, and that the defendant do stop the gaps thereof, yet an injunction will be granted restraining the defendant from impeding the plaintiff in his right of navigation, by continuing to keep the bank, &c. out of repair, &c. and by which means the full effect of the refused order was given; (*m*) and we have stated an instance of an injunction from permitting parts of buildings, erected contrary to an agreement, from remaining, which it is obvious was in effect equal to a direct decree that the defendant should remove the buildings. (*n*) So where the lessees of a colliery had agreed to grant the lessees of an adjoining colliery the use of a way, an injunction was granted to restrain the removal of materials essential to the enjoyment of such way. (*o*)

III. The PRACTICE and *Proceedings* relating to Bills for Specific Performance and Decree, &c.

We shall in the next volume fully consider the practice in filing and proceeding upon bills in equity; but it may be expedient in this part to suggest a few precautionary measures most particularly affecting bills for specific performance.

And, *first*, we will suppose that it is certain that the contract is of a nature to be enforced in equity, and that the complainant, whether vendor or purchaser, has done every thing incumbent on him to perform, and that the other party has either neglected or refused to perform his part. Still, before filing

(*j*) *Ante*, 297, 839; and *Wheatley* v. *Spade*, 4 Simon's Rep. 126.

(*k*) *Ante*, 824 to 852.

(*l*) *Ante*, 714.

(*m*) *Lane* v. *Newdigate*, 10 Ves. 192.

(*n*) *Ante*, 714, note (*i*); *Rankin* v. *Huskisson*, 1 Clark & F. 13.

(*o*) *Neumarch* v. *Brandling*, 3 Swans. 99.

any bill, the party complaining should, through his solicitor, cause a courteous letter or notice to be served on the other party, stating the act or omission complained of, and intimating the necessity for legal measures, unless redress be afforded before a named day. We have seen how far the adoption of this preliminary measure may affect the costs, and sometimes even the substance of the remedy. (*p*) The party still neglecting or refusing to perform his contract, a second application may still be advisable before the actual filing of the bill, the same as in case of a mandamus. (*q*)

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The Bill. (*r*)

In filing a bill for a specific performance, it seems advisable, where the contract ought, under the statute against frauds, to have been in writing, and signed, to charge in the bill that those requisites had been complied with; but if the bill charge that the contract was in writing, signature will be presumed, and the omission to state the same will be no ground of demurrer; (*s*) and where fraud or part performance is to be relied upon, each should be particularly stated in the bill; and there may be cases in which it may be judicious to anticipate and refute the supposed defence.

The Answer.

It has been much discussed whether and when a defendant should avail himself of the statute against frauds by way of demurrer, or by answer; and the latter seems preferable, if not absolutely necessary. (*t*) If the defect and objection appear clear upon the face of the bill, then a demurrer will be proper; but if some extrinsic fact be essential to complete the objection, then the answer must raise it. (*u*) We have seen that in equity a stipulation or an agreement to pay a fixed sum as damages affords no answer to a bill for specific performance. (*v*)

Reference of the title to the master.

In suits for the specific performance of an agreement, if the contract is admitted, and the only question is on the title of the seller, the court will, before the hearing upon motion, direct *a reference to a master to inquire into the title,* (*x*) although formerly this was not done till the regular hearing of the cause;

(*p*) *Ante*, 438, 439; and id. note (*g*), 561; and *Clermont* v. *Tasburgh*, 1 Jac. & W. 116. But see *post*, 868, as to costs of bills for specific performance, and 2 Mad. Ch. Pr. 560, 561, and id. 208.

(*q*) *Ante*, 808.

(*r*) See the forms of bills for specific performance at instance of vendor or purchaser, 2 Newl. Prac. 29, 31.

(*s*) *Rist* v. *Hobson*, 1 Sim. & Stu. 543; *ante*, 117, notes (*r*) and (*s*).

(*t*) *Rist* v. *Hobson*, 1 Sim. & Stu. 543; but see *Whitchurch* v. *Bevis*, 2 Bro C. C. 559; *Redding* v. *Wilkes*, 3 Bro. C. C. 400.

(*u*) *Fleming* v. *St. John*, 2 Sim. & Stu. 181.

(*v*) *Howard* v. *Hopkins*, 2 Atk. 371; 1 Mad. Ch. Pr. 44; *ante*, 727. What a penalty, or what stipulated damages, *Davies* v. *Penton*, 6 Bar. & Cres. 216.

(*x*) *Moss* v. *Matthews*, 3 Ves. 279; *Wright* v. *Bond*, 11 Ves. 39; *Gompertz* v. ——, 12 Ves. 17; 1 Newl. Ch. Pr. 204, from which these short observations are principally taken.

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and the case of *Moss* v. *Matthews* was the first instance in which the court deviated from the ancient practice. This reference has been directed before answer. (*y*) But reference will not be directed before the hearing where the purchaser resists the performance of the agreement on *other* grounds, as upon the laches of the vendor, (*z*) or on account of misrepresentation; (*a*) or where the vendor claims an abatement out of the purchase money; (*b*) or where the subject of the contract being a life annuity, the defendant also insisted that time was of the essence of the contract. (*c*) But the *other* matter upon which the defendant resists the performance must be substantial. (*d*) It seems that this order of reference to the master is, according to strict practice, simply for him to *inquire* whether a good title can be made; and that the inquiry as to *time*, when a good title can be made, if the vendor has such a title, is not directed until it is ascertained by the master's report whether there is a good title or not. (*e*) But although in strictness it is not regular to make it part of the order to inquire *when* a good title was shown, because if the master be of opinion that no good title was ever shown, that part of the order is nugatory; yet as the condition of those few words in the order of reference will, in case the master finds that a good title can be made, save the delay and expense of a further order and a further report, it is clearly for the interests of both parties that these words should be introduced. (*f*) If the master reports against the title of the vendor, and he is the plaintiff, it is not necessary to set down the cause in order that the bill may be dismissed with costs, but the court will make such an order upon motion. (*g*) But when on a reference to the master he reports that a good title to the purchase cannot be made, the vendee may file a bill against the vendor to have the contract delivered up; but it seems that *compensation* will not be granted for the loss sustained by the failure of the contract, though the bill pray, in the alternative, a specific performance, *or* an issue, *or* an inquiry before the master, with a view to damages, (*h*) that being more properly the subject of an action. (*i*)

(*y*) *Balmanno* v. *Lumley*, 1 Ves. & B. 224; sed *vide* 1 Meriv. 372.

(*z*) *Blyth* v. *Elmhust*, 1 Ves. & B. 1.

(*a*) *Paton* v. *Rogers*, 1 Ves. & B. 351.

(*b*) —— v. *Skelton*, 1 Ves. & B. 516.

(*c*) *Withey* v. *Cottle*, 1 Turn. 78.

(*d*) See *Boehm* v. *Wood*, 1 Jac. & W. 421; *Withey* v. *Cottle*, 1 Turn. 78; *Gordon* v. *Ball*, 1 Sim. & Stu. 178.

(*e*) *Gibson* v. *Clarke*, 2 Ves. & B. 103.

(*f*) *Anon.* 3 Mad. 495; *Hyde* v. *Wroughton*, Id. 280.

(*g*) *Walters* v. *Pyman*, 19 Ves. 351; *Whitcomb* v. *Foley*, 6 Mad. 3.

(*h*) *Todd* v. *Gee*, 17 Ves. 273, which seems to overrule *Greenaway* v. *Adams*, 12 Ves. 395.

(*i*) *Gwillin* v. *Stone*, 14 Ves. 128; 1 Mad. Ch. Pr. 440.

Decree in suit for Specific Performance, and how enforced.

Although in general a decree in equity is *in personam*, and is enforced in the first instance only by *attachment* for the contempt, yet if the party continue obstinate, and remain in custody for such contempt, the court will effectually exercise the power to grant an order requiring the party to deliver up the possession of the land to the person in whose favour the decree was made, and afterwards a writ of execution of that order must be served upon the defendant, and until that has been done no further order can be made. (*j*) If there be necessity, a *writ of assistance* will be issued directed to the sheriff, commanding him to be aiding and assisting in putting the party in possession. (*k*) In other cases, also, a Court of Equity will enforce execution by writ of assistance, as to put sequestrators in possession, and under which they may break locks. (*l*) We have seen the cases when or not payment of the purchase money will be decreed, subject to compensation, or when the inability to convey the whole will excuse the purchaser from completing the contract in part. (*m*)

Allowance for Deteriorations, &c.

Pending a bill for specific performance of a contract of sale or purchase of a real estate, if the purchaser has not been let into possession, the vendor is bound to take care and prevent the deterioration of the estate (except as against fire), (*n*) especially if the purchaser have been improperly kept out of possession, and the purchaser will upon petition, and after the amount of injury to the estate has been ascertained by the master or a jury, be allowed to deduct the same from the purchase money, and with interest, if the money has been paid into court. (*o*) We have seen the rights and liability of a purchaser of leasehold property (the lease and good-will of a public house), where he has improperly refused to take possession at the appointed time. (*p*)

Interest. (*q*)

With respect to *interest* upon the *purchase money* of an estate, the general rule seems to be that it must be paid by a purchaser from the time the contract ought to have been completed, (*r*) unless the purchase money has lain dead, and the purchaser gave the vendor notice of the fact, and the delay be

(*j*) Newl. Contr. 305; *Green* v. *Green*, 2 Simon's Rep. 430; see the practice as to enforcing a decree to deliver possession of an estate, 2 Mad. Ch. Pr. 469.

(*k*) 1 Ves. 454; 2 Harrison's Ch. Pr. 109, 5th ed.; Newl. Contr. 315, 316; see fully *Dove* v. *Dove*, 2 Dick. 617; and *Green* v. *Green*, 2 Sim. Rep. 394, 430.

(*l*) 1 Mad. Ch. Pr. 207, 208.

(*m*) *Ante*, 839 to 844; and see *Esdaile* v. *Stephenson*, 1 Sim. & Stu 122.

(*n*) *Ante*, 845, 846.

(*o*) *Ferguson* v. *Tudman*, 1 Simons, 350.

(*p*) *Ante*, 858, note (*e*).

(*q*) See in general Sugd. V. & P. Index, Interest; 2 Madd. Ch. Pr. Index, Interest.

(*r*) See *Lowther* v. *Andover*, 1 Bro. C. C. 396; 6 Ves. J. 143, 352; *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 123.

occasioned by the vendor. (s) Where the conditions of sale provide that interest shall be paid from a certain day, if the purchase be not then completed, the purchaser cannot then relieve himself from payment of interest by alleging that the delay in completing the contract was caused by the vendor; although it is otherwise where there is no such express stipulation; (t) but where the purchaser, upon entering into possession, paid the amount of his purchase money to his banker, and gave notice that he was ready to invest it in such manner as the vendor should require, and no answer was returned to that notice, and the purchaser, during the investigation of the title, kept in the hands of his banker a balance equal to the amount of the purchase money, except for four days, when it was a little less; the court held the purchaser not to be liable for interest on the difference between his average balance during the period in question, and during the three preceding years. (u) But a purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. (x) And where a contract of purchase contained a stipulation, that if by reason of any unforeseen or unavoidable obstacles the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5*l*. *per cent.* on his purchase money, and be entitled to the rents and profits of the premises, and the vendor did not show a good title till long after the specified day, he was held not to be entitled to interest except from the time when a good title was first shown. (y) So where a purchaser takes possession, and agrees to pay interest, he may rescind the agreement if it appear that a long time must elapse before a title can be made, unless he acquiesce in the delay. (z) Nor is a purchaser bound to pay interest after the conveyance is delivered to the vendor's attorney for execution. (a) Interest on timber runs only from the valuation, because surveyors always value timber according to its present state; and the augmented value in the timber by growth is an equivalent for the interest from the time of the

(s) *Howland* v. *Morris*, 1 Cox, 59; *Calcraft* v. *Roebuck*, 1 Ves. J. 221; *Powell* v. *Martyr*, 8 Ves. 166.

(t) *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 122.

(u) *Winter* v. *Blades*, 2 Sim. & Stu. 393.

(x) *Jones* v. *Mudd*, 4 Russ. Rep. 118.

(y) *Monk* v. *Huskisson*, 4 Russ. Rep. 121, in note.

(z) *Fludyer* v. *Cocker*, 12 Ves. J. 25; Sugd. V. & P. 505, 506.

(a) Id. ibid.; Sugd. V. & P. 507.

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contract to the making the valuation. (*b*) And where a leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs, as it would not be just to make the purchaser pay the whole purchase money after part of the term has elapsed, without his having derived any benefit from the estate, the court will compel the vendor to pay a rent in respect of his occupation of the estate, and the purchaser to pay interest on the purchase money during the delay. (*c*) And it has been held that interest must be paid in respect of a sum deposited in the hands of a purchaser to pay off incumbrances. (*d*) And it should seem that an agreement to pay interest on the purchase money, although signed by the vendor only, will be binding on the purchaser, if the contract of sale have been in part performed. (*e*)

A *purchaser* never pays interest on the *deposit*; (*f*) and though he may under circumstances recover interest on a deposit paid either to a principal or to an auctioneer, (*g*) yet he cannot recover interest against the latter unless under peculiar circumstances; (*g*) and where an auctioneer employed to sell an estate received a deposit from the purchaser, he was considered to be a mere stakeholder, liable to be called upon to pay the money at any time; and that therefore, although he placed the money in the funds and made interest of it, yet he was not liable to pay such interest to the vendor when the purchase was completed, though the vendor, without the concurrence of the vendee, gave notice to invest in government securities. (*h*) When interest has been recovered against an auctioneer, he may recover it from the vendor if he be not himself in fault. (*i*) And it has been laid down as a general rule, that where the original contract is void, the purchaser can only recover his deposit in an action for money had and received, and will not be allowed interest. (*k*)

Interest must be *paid* by a *vendor* where he cannot make a title, if the purchase money has lain dead, and he has had notice of that fact. (*l*)

Rate of interest.

Where interest is recovered at *Law*, it is always at the rate

(*b*) *Waldron* v. *Forester*, Exchequer, June 30, 1807; Sugd. V. & P. 507, 508.

(*c*) *Dyer* v. *Hargrave*, 10 Ves. J. 505; Sugd. V. & P. 509.

(*d*) Sugd. V. & P. 511.

(*e*) *Owen* v. *Davies*, 1 Ves. 82.

(*f*) Sugd. V. & P. 511.

(*g*) Id. ibid. 513, 222.

(*h*) *Harrington* v. *Hoggart*, 1 B. & Adolp. 577; and see other cases, Sugd. V. & P. 512.

(*i*) *Spurrier* v. *Elderton*, 5 Esp. Ca. 1.

(*k*) *Walker* v. *Constable*, 1 Bos. & Pull. 306; *Tappenden* v. *Randall*, 2 Bos. & Pull. 472, *sed qu.*; and see Sugd. V. & P. 224.

(*l*) Sugd. V. & P. 513, 514.

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of 5*l.* per cent., but in Equity the rate of interest is 4*l.* per cent. (*m*) And the same rate of interest seems payable whether the estate be sold by private agreement or by a Master under a decree of a Court of Equity. But it has been held that an agreement by a purchaser to pay a rent exceeding legal interest is not usurious. (*n*)

When Compensation to Purchaser.

Compensation, we have just seen, will not be granted in equity to a purchaser for any loss sustained by the bargain, in consequence of the vendor not being able to perfect a title, the remedy, if any, being at law; (*o*) and at law, in the absence of fraud, the general rule is, that only nominal damages shall be recoverable by a disappointed purchaser, together with his deposit and interest and expenses of investigating the title, and not actual considerable damages for not making out a perfect title. (*p*) But that doctrine has recently received qualification, and if a party expose to sale, knowing that he has no title, or that he has only an equitable or imperfect title, he may then at law have a verdict against him for considerable damages, at least to make remuneration for trouble and vexation, besides interest and expenses, if not for the loss of the bargain. (*q*)

Costs when and how recoverable.

The *costs* incident to a bill for specific performance of a contract vary as well according to the result of the suit as the degree of readiness to clear up the title or perform the contract on each side, but these will be considered in the next volume. (*r*)

Bill to compel an *Account.* (*s*)

Whenever an agent or other party has *expressly* or *impliedly agreed* to account for monies received for the use of another, after his refusal to do so, we have seen that he may by bill filed be compelled, this is in the nature of a bill for specific performance; (*t*) and if an agent do not render his account within a reasonable time, he must bear the costs of a suit instituted to have the account taken; and it will not be any excuse for him that he offered to pay on account a gross sum, which turns out would have covered all that was due from him, for the principal has a right to have all the particulars of the account with vouchers

(*m*) Sugd. V. & P. 516, note 7.
(*n*) *Spurrier* v. *Mayoss*, 1 Ves. J. 527.
(*o*) *Ante*, 865; 1 Mad. Ch. Pr. 440.
(*p*) *Flureau* v. *Thornhill*, 2 Bla. Rep. 1078; and see *Johnson* v. *Johnson*, 3 Bos. & Pul. 167; *Brig's case*, Palm. 364; *Bratt* v. *Ellis* and *Jones* v. *Dyke*, Sug. V. & P. Appendix, No. 7 and 8; *ante*, 864, notes (*h*), (*i*).
(*q*) *Hopkins* v. *Grazebrook*, 6 Bar. and Cres. 31; 9 Dowl. & R. 22 S. C.; Sug. V. & P. 8 ed. 222, 223.
(*r*) 2 Madd. Ch. Pr. 560, 561, 562, 208.
(*s*) See several cases 3 Bla. Com. 426, &c.; Chit. Eq. Dig. Account; and 1 Madd. Ch. Pr. 85.
(*t*) *Ante*, 439, note (*g*), 509.

for alleged payments. (*u*) It lies generally where there have been mutual demands, and principally against factors and agents, (*x*) and who must account, although the so doing might subject them to penalties. (*y*) So this bill is sustainable upon dealings between tradesmen and their customers, or landlords and tenants, and by an heir, who has not possession of title deeds, in relation to the produce of mines; or where timber has been cut; and the delivery of an account, even of legal waste, within six years, takes all prior items out of the statute of limitations. (*z*) It lies to account for the rents and profits of lands when under an elegit, or for arrears of a rent charge, or mesne profits, or shares in waterworks, and between partners, (*a*) but then in general a dissolution should also be prayed; (*b*) or in relation to tithes, waiving penalties; (*c*) and between mortgagor and mortgagee; (*d*) and in relation to a wife's separate estate or pin-money. (*e*) And although at law, on account of the rule *actio personalis moritur cum persona*, no *action* can be sustained against the executor of a tenant for life, for waste, unless perhaps when the latter or the executors have received the price of the trees cut down and sold, (*f*) yet a bill for an account of waste and trees cut by a tenant for life may be sustained by the remainder-man against such executors. (*g*)

We have seen that the adjustment of an account at law is frequently attended with difficulties, (*h*) and between partners it can only be effected in equity, unless a balance has been admitted, or there has been an express covenant; (*i*) and although between joint-tenants and tenants in common an action of account at law is sustainable, yet a Court of Equity has a more perfect jurisdiction, by compelling discovery on oath, and avoiding the difficulty and delay where the account comes before auditors in an action of account; (*k*) but after

(*u*) *Collyer* v. *Dudley*, 1 Turn. & R. 421.

(*x*) *Ante*, 439; *Green* v. *Weaver*, 1 Simon's R. 404, 424; 1 Madd. Ch. Pr. 88.

(*y*) *Green* v. *Weaver*, 1 Simon's R. 404, 424.

(*z*) *Hony* v. *Hony*, 1 Sim. & Stu. 568.

(*a*) 1 Mad. Ch. Pr. 87 to 93.

(*b*) *Semble*, *Lacombe* v. *Russell*, 1 Clark & Fin. 8; but when otherwise, *Harrison* v. *Armitage*, 4 Madd. 143; *Knowles* v. *Haughton*, 11 Ves. 168; *Const* v. *Harris*, 1 Turn. & R. 496 to 529; *ante*, 851.

(*c*) 1 Madd. Ch. Pr. 108.

(*d*) Id. ibid. 536.

(*e*) Id. ibid. 489, 490, 586.

(*f*) *Utterson* v. *Vernon*, 3 T. R. 549; *Hambly* v. *Trott*, Cowp. 373, 374; *Burnett* v. *Kensington*, 7 T. R. 216; 1 Saund. 216, n.

(*g*) *Lansdown* v. *Lansdown*, 1 Madd. R. 146; 1 Jac. & W. 522, S. C.; *Marquis of Ormonde* v. *Kynersley*, 5 Madd. 369; 1 Chit. Eq. Dig. tit. Account, 395; Id. tit. Waste.

(*h*) *Ante*, 21, 22.

(*i*) *Smith* v. *Barrow*, 2 T. R. 478; *Fromont* v. *Coupland*, 2 Bing. 176; *Coffee* v. *Brian*, 3 Bing. 55; *Boville* v. *Hammond*, 6 Bar. & Cres. 149; *Rackstraw* v. *Imber*, Holt's C. N. P. 368.

(*k*) 1 Madd. Ch. Pr. 85; *Smith* v. *Smith*, 2 Chitty, R. 10; 3 Dowl. & R. 595, S. C.

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a decree to account, a party is not allowed to bring an action at law on the same subject. (*l*) On such a bill the *defendant* is to be allowed on his own oath all payments under 40*s*., but then he must mention in his affidavit to whom, when, and for what he paid, (*m*) and the whole so allowed must not exceed 100*l*, (*n*) and the plaintiff will not be allowed any thing upon his oath. (*o*) If an account be sought by bill, and a balance should be reported due to the *defendant*, he may enforce payment under the decree, (*p*) and both parties are so far considered actors, that either may revive. (*q*) If the *right* at law be doubtful, an issue is directed, and if the right be established the account follows; (*r*) and in general, where the party cannot recover at law, a bill for an account is not sustainable. (*s*) But the issue directed to be tried should be upon a question of right, and not to investigate the items of the account; and in one instance, where there had been several deaths and changes in the representatives of deceased parties, and an intricate account of several years' standing, an issue having been directed from the Rolls to the Court of Common Pleas to try how much had been paid and received, and how much remained due, the Chief Justice refused to try the cause, and the amount was afterwards taken in a Master's office.

Other Specific Reliefs, as *payments, sales, &c.*

In aid of proceedings at law, a Court of Equity can also afford specific remedy, as *payment* of a judgment. Thus a judgment creditor may file a bill against the owner and receiver of an estate, and without making other incumbrancers parties, to have his debt satisfied out of the *surplus rents*. (*t*) So that a judgment creditor, although he may not be able by *elegit* to obtain direct and legal possession or receipt of a moiety of the rents of an estate, may by this means secure the due application of the surplus rents after satisfying prior incumbrancers, and to prevent the owner of the estate from receiving such surplus, and this without paying off the incumbrances, which was necessary according to the previous practice. (*u*)

Where *perishable* commodities, such as rents in poultry or produce of a farm, have been taken under a sequestration, the court will, on motion, of which notice must be given, order the

(*l*) *Bell* v. *O'Reilly*, 2 Scho. & Lef. 430.

(*m*) 1 Vern. 283.

(*n*) Id. Ibid. 276; 2 Vern. 283.

(*o*) Id. ibid.

(*p*) *Bodkin* v. *Clancey*, 1 Ball & B. 217; 1 Mad. Ch. Pr. 86.

(*q*) *Dane's case*, 1 P. W. 263; *Hollingshead's case*, Id. 743; Pr. Ch. 197.

(*r*) *Milbourn* v. *Fisher*, 5 Ves. 685.

(*s*) *The Corporation of Carlisle* v. *Wilson*, 13 Ves. 278; 1 Madd. Ch. Pr. 86.

(*t*) *Lewis* v. *Lord Zouch*, 2 Simons, 388.

(*u*) Id. ibid; see the proceedings before this decision, Tidd, 9th edit. 1036.

same to be sold. (x) And it should seem that such a power of sale ought to be extended to *liens*, at least upon *perishable* commodities. (y)

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There have been instances in which the Court of Chancery has decreed the *payment* of money to be levied by a *parish rate*; but in other cases the court has refused to entertain such a jurisdiction. (z)

Suits to *prevent the specific enforcement of penalties*, or *forfeitures*, or *legal rights*. (a)

As Courts of Equity will *enforce* specific performance of some contracts, so on the other they will *prevent the specific enforcement* of some contracts and rights at law, and compel the party who seeks to enforce the same to be content with the performance or delivery of the thing really intended to be performed, as in case of bonds in penalties conditioned for the performance of some other act. (b) But where the sum named is not a penalty but in the nature of *stipulated damages*, as 5*l.* per acre increased rent for ploughing ancient meadow, it will be otherwise, for then equity will not relieve against the payment; (c) and the same rule prevails at law, for such stipulations are then considered as really intended to be performed. (d) Courts of law, even in violence to the terms of a contract, will even frequently construe a sum expressly described as stipulated damages to be only a penalty. (e) We have seen what clauses of forfeiture in leases Courts of Equity will or not relieve against. (f) Other instances are also collected in a valuable work to which we have frequently had occasion to refer. (g) And in one case an order was made specifically to restore to a tenant farming stock on a farm, seized by the landlord under a distress and bill of sale, the landlord not distinctly stating whether the sum below which, by the terms of the contract, he was not to enforce his remedies by distress or seizure, was due. (h)

(x) *Mitchel* v. *Draper*, 9 Ves. 208; *sec contra*, *Willocks* v. *Willocks*, Ambl. 421.

(y) *Sed quære*, *sed vide ante*, 491 to 493.

(z) See cases referred to in note to *Ex parte Fowler*, 1 Jac. & Walk. 73, 74; see further, Chit. Eq. Dig. tit. Parish, 737; see Mandamus rate, *ante*, 803, 804.

(a) See in general, 3 Bla. C. 426, b., in notes.

(b) Newl. Contr. 307 to 313; 3 Chit. Bla. Com. 427, b., in notes.

(c) *Woodward* v. *Gyles*, 2 Vern. 119; *Rolfe* v. *Paterson*, 2 Bro. P. C. 426; Newl. Contr. 313.

(d) *Farrant* v. *Olmius*, 3 Bar. & Ald. 692; Holt's C. N. P. 46.

(e) *Davies* v. *Penton*, 6 Bar. & Cres. 216.

(f) *Ante*, 288 to 291; see *Hill* v. *Barclay*, 16 Ves. 402; *Bracebridge* v. *Buckley*, 2 Price, 200; 3 Chit. Bla. C. 427, b., notes. See in general Chit. Eq. Dig. Covenant, VIII.

(g) Newl. Contr. 316 to 327.

(h) *Nutbrown* v. *Thornton*, 10 Ves. 159.

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Of the recovery of *Penalties* or Compensation in *Damages in general.*

We have thus endeavoured to collect the rules which should govern the conduct of parties in *Preventing* or *Removing* Injuries, or *Enforcing Specific Relief or Performance*, whether by their own acts, or by the assistance of legal officers, or by proceedings at Law or in Equity. We might, perhaps, here with propriety add a Chapter upon the subject of *Compensation in Damages*, and state when the payment of *Penalties* or *Stipulated Damages* may be enforced; but it may suffice to observe, that in general, since the statutes upon the subject, (*i*) *penalties*, whether at law or in equity, are merely nominal, and stand as a security only for what is justly due or recoverable; and in equity they are not even the limit of the sum to be paid, for interest may, under circumstances, be recoverable beyond the penalty. And at law the courts so strongly incline against penalties, that although a sum be named in a written contract (when not under seal) and be declared by the parties to be *stipulated damages* and to be paid as such, yet the courts will treat the same as a penalty, and prevent the party, who may have stipulated to receive the same, from recovering more than the real damages he has sustained by the breach of the contract. (*k*) In these cases, at law as well as in equity, the courts hold that all the parts of the instrument must be looked at, in order to ascertain whether it ought not to be held to have been the intention of the parties (contrary even to their *express* words) that the sum named should be a penalty or liquidated damages, and that where the sum which is to be a security for the performance of an agreement to do several acts, would, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, then that sum is to be considered *a penalty*. (*l*) But we will more fully consider penalties and damages in that chapter of the next volume which relates to the *Verdict of* the Jury. We have therefore now disposed of the rules relating to the substance of the Remedies, and in the next volume shall consider the *practical* modes of conducting the different remedies to enforce specific relief, or performance, or compensation.

(*i*) 8 & 9 Wm. 3, c. 11, s. 8, as to *Penalties* in general; 4 & 5 Anne, c. 16, as to bail bonds; 11 Geo. 2, c. 19, as to replevin bonds.

(*k*) *Davies* v. *Penton*, 6 Bar. & Cres. 216; *Kemble* v. *Farren*, 6 Bing. 141; Chit. jun. on Contracts, 336. See form of a *penalty* clause and *stipulated damage* clauses in 4 Chitty's Commercial Law and *notes* 2 and 3; and see 3 Id. 627; *Reilly* v. *Jones*, 8 Moore, 244; 1 Bing. 302, S. C.; *Edwards* v. *Williams*, 5 Taunt. 247.

(*l*) In *some* of the cases at Nisi Prius it must be confessed that the judges have gone very far to *reform* and *vary* the apparent contract, and to decide as if the parties were incompetent to contract for themselves, and that therefore each judge ought to make a *better contract* for them, though certainly the rule at law and equity has always been stated to be otherwise, *ante*, 118 to 127.

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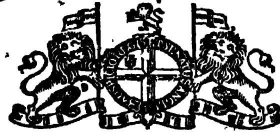
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